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15 to 17

31

42

19 to 29

43, 46, 50

29, to 31, 33

34, 35, 36

51

43, 45, 48

36, 39, 41

38 to 43

44, 45

3 & 4

48, 50, 53, 54

15 to 27

55

25 to 29

32, 34

15

27

9

41 to 44, 50, 54

27, 29, 30, 33, 35, 38, 40, 42, 47 & 51, 54, 56

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THE LAW
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INCLUDING RIGHTS AND DUTIES OF RIPARIAN OWNERS,
CANALS, FISHERY, NAVIGATION, FERRIES, BRIDGES,
AND TOLLS AND RATES THEREON.

BY
Henry
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OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW,

AND
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PREFACE TO SECOND EDITION.

SINCE the publication of the "Law of Waters: Sea, Tidal, and Inland," in 1880, several Acts of Parliament relating to the various branches of law of which it treats have been passed.

Of these the most important are the Merchant Shipping Act, 1894, the Railway and Canal Traffic Act, 1888, and the Thames Conservancy Act, 1894, which respectively consolidate previous legislation on the subjects to which they relate. Acts have also been passed for confirming the Conventions made in 1882 and 1887 between Great Britain, Germany, Denmark, Holland, and France respecting the police of fisheries and the liquor traffic in the North Sea, and between Great Britain and the United States respecting fur seal fisheries in the Behring Sea; while provision has been made for the establishment of sea fishery boards in British waters by the Sea Fisheries Regulation Act, 1888. Fishery law in inland waters has been amended by the Salmon Fishery Acts of 1884 and 1886; the law relating to water supply by the Local Government Act, 1894, and the Public Health (London) Act, 1891; and the law relating to pollution by the Local Government Act, 1888, which empowers county councils to enforce the provisions of the Rivers Pollution Prevention Acts. There have also been numerous decisions of the Courts, some of which are of considerable importance, on the branches of the law treated of in their work, and the authors have therefore been induced to think that a new edition bringing the law relating to waters up to date may be of use to the profession and the public.

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July, 1902.

H. J. W. C.

U. A. F.

PLAN OF THE WORK.

CHAPTER I.

	PAGE
OF THE SEA AND RIGHTS THEREIN	1—57
The High Seas	1
Territorial Waters	5
The Seashore	14
Ownership of the Soil and Rights connected therewith	15
Protection from Inroads of the Sea	31
Public and Private Rights thereon	40
Ports and Harbours	50

CHAPTER II.

OF INLAND WATERCOURSES : THE OWNERSHIP OF THE SOIL THEREOF, AND OTHER MATTERS	58—109
Definition of a Watercourse	58
Tidal Navigable Rivers	65
Private Rivers and Streams	99
Lakes and Pools	105
Artificial Watercourses	108

CHAPTER III.

OF NATURAL RIGHTS OF WATER, AND THEREIN OF THE DUTIES OF RIPARIAN OWNERS	110—208
Riparian Rights generally	110
The Right to Water in its natural Quantity, and Injuries thereto	121
By Abstraction and Diversion	121
By Obstruction and Overflow	136
The Right to Water in its natural Quality, and Injuries thereto by Pollution	158
Surface and Percolating Water	188

CHAPTER IV.

OF ACQUIRED RIGHTS OF WATER, AND THE EASEMENT OF WATERCOURSE	204—267
Easements of Water, how acquired	205
By express Grant	205
By implied Grant	216
By Prescription	229

	PAGE
Particular Easements of Water	240
Abstraction, Diversion, and Obstruction	241
Pollution	243
The Easement of artificial Watercourse	248
Of Drip	264
Extinguishment of Easements of Water	264

CHAPTER V.

OF CANALS, WATER SUPPLY, AND DOCKS	268—336
Rights and Duties of Bodies exercising Statutory Powers	268
Canals	275
Rights connected with the Ownership of the Soil	277
Duties of Proprietors to Owners of adjoining Lands	279
Duties with regard to Navigation	303
Water Supply	309
Companies having Parliamentary Powers	309
Companies having no Parliamentary Powers	320
Local Authorities supplying Water	322
Docks	329

CHAPTER VI.

OF FISHERY	337—407
The various Rights of Fishery	337
Fishery in the Sea	344
In Tidal Waters	345
In Private Streams	362
In Lakes and Pools	372
Statutory Regulations affecting Fishery	377
As to Season	391
As to means of taking Fish	396

CHAPTER VII.

OF NAVIGATION, AND THEREIN OF CONSERVANCY	408—500
The general Right : its Nature, Extent, and the Injuries thereto	408
On the Sea	409
On Tidal Rivers	429
On Private Waters	453
The Conservancy of Navigation, and the Powers and Duties of Conservators	460
Generally	460
On the River Thames	477
General Statutory Provisions as to Inland Navigation	488

CHAPTER VIII.

	PAGE
OF FERRIES AND BRIDGES	501—545
Ferries	501
Bridges	516
Liability of the County to repair	522
Liability to repair <i>ratione tenure</i>	538
Liability to repair by Prescription	543

CHAPTER IX.

OF TOLLS AND RATES	546—621
Tolls	546
Tolls generally	546
On the Sea, Navigable Rivers, and Ports	556
Shore Duties	571
On Harbours and Lighthouses	574
On Docks and Piers	577
On Canals	587
Rates	594
On Docks, Harbours, and Marine Property	595
On Rivers and Ferries	605
On Fisheries	607
On Canals	608
On Water Companies	613
On Bridges	619

CHAPTER X.

OF THE REMEDIES FOR THE INFRINGEMENT OF RIGHTS OF WATER .	622—643
By Act of Party	623
By Act of Law	626

APPENDIX I.

THE BYE-LAWS REGULATING THE NAVIGATION OF THE RIVER THAMES .	645
--	-----

APPENDIX II.

THE BYE-LAWS REGULATING THE FISHERIES IN THE RIVER THAMES .	664
---	-----

INDEX	671
-----------------	-----



INDEX TO CASES CITED.

A.		PAGE		PAGE
ABBOT of Combe's case		545	Att.-Gen. v. Acton Local Board ...	171,
— of Strata Marcella, case of...		354		175, 247, 638, 639
Aberdeen Arctic Co. v. Sutter		344	— v. Barker	627
— v. Menzies.....		85	— v. Basingstoke.....	178, 635
Abraham v. Great Northern Rail- way	61, 430, 449		— v. Birmingham...116, 169, 165, 166, 169, 172, 177, 178, 245, 267, 372, 504, 635, 637, 639, 640, 641, 643	
Acheson's Estate, <i>In re</i>	339, 627		— v. Blantyre	21
Acheson v. Henry	339		— v. Bradford...167, 276, 291, 639	
Ackroyd v. Smith	204, 216		— v. Bristol	315
Acton v. Blundell	59, 62, 111, 189, 191, 193, 196, 202		— v. Burridge ... 40, 82, 437, 642	
Agnew v. Lord Advocate	21, 23, 24		— v. Ceeley	19
Aiton v. Stephen.....	42, 346, 551		— v. Chamberlaine	14
Alabama (State of) v. Georgia... 62, 478			— v. Chambers ... 14, 15, 17, 21, 30, 31, 66, 72, 76	
Alcock v. Cooke	44		— v. Cockermouth 172, 176, 177, 178, 633, 635, 639, 641	
Alder v. Savile	242		— v. Colney Hatch...165, 166, 171, 172, 174, 177, 178, 640, 641	
Aldred's case	177, 372, 643		— v. Constable	627
Alexander v. Shiel	400		— v. Dorking Union ... 171, 173, 179, 184, 185, 186, 639	
Allan v. Overseers of Liverpool.....	600		— v. Emerson...15, 24, 28, 43, 44, 74, 99, 340, 341, 354, 355, 356, 370, 642	
Allen v. Donelly	43		— v. Farmer	19
— v. Lockham.....	216		— v. Forbes	537
Allgood v. Gibson	49, 367		— v. Furness Railway... 491, 531	
Allnutt v. Inglis.....	272, 273, 329, 460, 572, 580, 581		— v. Gt. Eastern Railway... 121, 640	
Alston's Estate, <i>In re</i>	23		— v. Hackney..... 165, 172, 174, 635, 639	
Alston v. Scales	629		— v. Halifax ..159, 165, 166, 174, 175, 247, 635, 639, 640, 641	
Anderson v. Hamlin	391		— v. Hammer	19, 23
— v. Oppenheimer	142		— v. Johnson..... 40, 43, 82, 437, 635, 642	
Anguish v. Ebdon	515		— v. Jones..... 15, 17, 19, 21, 24, 27, 337, 576	
Angus v. Dalton	230, 231, 237, 239		— v. Kingston..... 172, 174, 177, 246, 247, 267, 639	
Annapolis, The.....	12		— v. Leeds ... 159, 165, 166, 169, 170, 173, 175, 177, 178, 247, 633, 639, 641	
Anon., Durham Assizes.....	408, 435		— v. Lonsdale..... 39, 82, 84, 86, 154, 432, 439, 440, 635, 642	
— (2 Eq. Abr.)	165		— v. Luton ... 177, 178, 246, 247, 372, 641, 643	
Anonymous case (1 Camp. 516).....	359, 419		— v. Mathias	49
— (6 Mod. 73).....	43, 44		— v. Metropolitan Board of Works	171, 172
— (6 Mod. 149)	44			
— (Dyer)	30			
Apollo, The	331, 332			
Arkwright v. Gell.....	58, 259, 261, 262, 263, 300			
Arlett v. Ellis	625			
Armstrong and Others, — v.	606			
Arnell v. London & N. W. Railway	621			
— v. Regent's Canal.....	621			
Ashworth v. Browne.....	351, 638			
Athol v. Midland Great Western Railway	216			
Atkins v. Davis.....	614			
Atkinson v. Gateshead Water Co....	311, 314			

	PAGE		PAGE
Att.-Gen. <i>r.</i> Mid Kent	531	Barton <i>v.</i> Benett	554
— <i>v.</i> Newcastle-on-Tyne ...	642	Bateman <i>v.</i> Ashton-under-Lyme ...	316
— <i>v.</i> Nicholl	247, 637	Bath River <i>v.</i> Willis	88
— <i>v.</i> Parmeter	15, 40, 43, 80, 82, 434, 437, 642	Batishill <i>v.</i> Reed	631
— <i>v.</i> Plymouth	19	Batten's case	623
— <i>v.</i> Portsmouth	15, 19, 21, 23, 24	Battersby <i>v.</i> Kirk	584
— <i>v.</i> Reeve	30, 73, 627, 642	Baxendale <i>v.</i> McMurray... 243, 247, 248	
— <i>v.</i> Richards ... 18, 40, 83, 437, 642		Baxter <i>v.</i> Tayler	629
— <i>v.</i> Richmond	178	Bealey <i>v.</i> Shaw... 115, 233, 241, 242, 267	
— <i>v.</i> Simpson.....458, 501, 502		Beaver <i>v.</i> Manchester (Mayor of)... 529	
— <i>v.</i> Sheffield	165, 175, 635, 637, 639	Beaudeley <i>v.</i> Brook	216
— <i>v.</i> Terry...18, 82, 83, 85, 86, 87, 432, 438, 440, 441, 642		Beaufort <i>v.</i> Patrick	208
— <i>v.</i> Thames (Conservators of)	42, 97, 449	— <i>v.</i> Swansea	23, 24, 355
— <i>v.</i> Tomline	24, 34, 147	Beauman <i>v.</i> Kinsella	363
— <i>v.</i> Wemyss...49, 87, 92, 95, 97, 436, 631		Beckett <i>v.</i> Metropolitan Board	97
— <i>v.</i> Wright	40, 82, 97, 230, 346, 433, 435	Beech <i>v.</i> Lucas	385
— of Prince of Wales <i>v.</i> St. Aubyn	642	Becston <i>v.</i> Weate..... 127, 129, 131, 229, 241, 254, 351	
Aynsley <i>v.</i> Glover..... 166, 233		Belfast Dock, <i>In re</i>21, 23, 24	
B.		— Rope Works <i>v.</i> Boyd...83, 84, 122	
Badecock <i>v.</i> Hunt	317	Belgie, The	331
Badger <i>v.</i> Yorkshire Railway ... 89, 109, 468, 606		Bell <i>v.</i> Midland Railway..... 629	
Bagnal <i>v.</i> London & S. W. Railway 152, 469		— <i>v.</i> Quebec (Corporation of)...67, 430, 447, 643	
Bagot <i>v.</i> Orr	15, 43, 48, 98	— <i>v.</i> Twentyman	142, 161, 629
Bailey <i>v.</i> Clark	134, 164, 231, 252	Benest <i>v.</i> Pipon	48
Baird <i>v.</i> Fortune	49	Benjamin <i>v.</i> Storr	177, 626, 634
— <i>v.</i> Williamson	140, 144, 145	Bennett <i>v.</i> Coster ..	337, 343
Baker <i>v.</i> Greenhill	516, 538, 539	Berridge <i>v.</i> Ward..... 101	
Ball <i>v.</i> Herbert..... 87, 88, 431, 435, 560		Berwick Harbour <i>v.</i> Tweedmouth... 598	
Ballacorkish Mining Co. <i>v.</i> Harrison 195		Beswick <i>v.</i> Combdon	143
Ballard <i>v.</i> Dyson	453	Bevins <i>v.</i> Bird	361
— <i>v.</i> Tomlinson	134, 136, 142, 161, 162, 201, 264	Bickett <i>v.</i> Morris	67, 81, 83, 84, 85, 100, 102, 154, 156, 362, 634
Balston <i>v.</i> Bensted	194	Bidder <i>v.</i> Croydon.....177, 178, 372, 643	
Baltimore Wharf case	50, 57	Bilbao, The	3, 331
Bankart <i>v.</i> Houghton	208, 209, 639	Binks <i>v.</i> South Yorkshire Railway... 291, 292	
— <i>v.</i> Tennant..... 208		Bird <i>v.</i> Great Eastern Railway	339
Banne (Royal Fishery of the)	19	— <i>v.</i> Higginson.....207, 342, 343	
Barber <i>v.</i> Nottingham Railway..... 315		Birmingham and Dudley Bank <i>v.</i> Ross..... 214, 262	
Barclay (case of the Barons of)... 23, 24		Birmingham Canal <i>v.</i> Birmingham 610	
Barker <i>v.</i> Faulkner	362, 372	— <i>v.</i> Dudley...197, 200, 281	
— <i>v.</i> Nottingham Canal	289	— <i>v.</i> Hawkesford... 281	
Barlow <i>v.</i> Rhodes..... 217		— <i>v.</i> Hickman 279, 280	
Barnard Castle District <i>v.</i> Wilson... 316		— <i>v.</i> Swindell	200
Barnes <i>v.</i> Loach	217, 243	Bishop <i>v.</i> Bedford	632
Barnsley Canal <i>v.</i> Twibill	281	Black <i>v.</i> Ballymena Commissioners 198	
Barracrough <i>v.</i> Brown	453	— <i>v.</i> Bateman	626
Barrett <i>v.</i> Stockton and Darlington Railway ... 576, 578, 584, 587		Blackburn <i>v.</i> Somers...134, 243, 244, 253	
—, Doe <i>d.</i> , <i>v.</i> Kemp..... 364		Blacketer <i>v.</i> Gillett	505
Barry <i>v.</i> Arnaud	45	Blackett <i>v.</i> Smith..... 582, 583	
Bartlett <i>v.</i> Baker	632	Blackpool Pier <i>v.</i> Fylde Union... 10, 15, 30, 597	
		Blagrove <i>v.</i> Bristol Waterworks ... 315	
		Blake <i>v.</i> Land and House Corpora- tion..... 142	
		Blakemore <i>v.</i> Glamorgan Canal ... 215, 276, 297, 303, 331	
		Blanchard <i>v.</i> Bridges	208, 209, 243
		Bland <i>v.</i> Lipecombe ... 49, 339, 347, 367	
		Blandford <i>v.</i> Morrison	486
		Blantyre <i>v.</i> Rabbie	313

	PAGE
Blantyre v. Clyde Navigation	481
— v. Doon	85
Blatchford v. Plymouth	210
Blewett v. Tregonning	49
Blisset v. Hart	502
Bloomfield v. Johnson... 65, 67, 102, 104, 107, 108, 339, 340, 341, 348, 369, 370, 373, 460, 643	
Blower v. Ellis	107, 108, 349, 376
Blundell v. Catteral ... 1, 14, 15, 81, 87, 345, 346	
Blyth v. Birmingham Water Co. ... 137, 150, 151, 320	
— Harbour v. Newsham	598
Booth v. Ratté..... 83, 87, 93, 95, 111	
Bostock v. Staffordshire Railway ... 277, 278, 280	
Boughton v. Midland and Great Western Railway... 137, 150, 153, 294	
Bourke v. Davis	454
Bower v. Hill..... 266, 453	
Box v. Jubb	137, 150
Bradbury v. Manchester S. & L. Railway..... 638	
Bradford Corporation v. Pickles ... 59, 189, 192, 195	
Bradley v. Newcastle-on-Tyne... 562, 569	
— v. Price	396
Brain v. Marfell	58, 195, 211, 212
Bramlett v. Tees Conservancy... 34, 470	
Brecknock Navigation v. Pritchard 541	
Brecon Markets v. Neath and Brecon Railway..... 530	
Breda v. Silberbauer..... 119, 237, 265	
Brent v. Haddon	625
Brett v. Beales..... 54, 547, 550, 588	
Brew v. Haren	21, 24
Bridger v. Richardson..... 382	
Bridges' case..... 92, 137, 468	
— v. Highton	643
Bridgland v. Shapter	502
Bridgwater v. Bootle-cum-Linacre... 14, 15, 76, 81, 595	
Briggs v. Swanwick	398
Bright v. Walker	231, 237, 265
Brine v. Great Western Railway ... 168, 274	
Briscoe v. Drought	58
Bristol Harbour case	642
— Water Co. v. Uren	317
Bristowe v. Cormican..... 15, 16, 22, 31, 59, 65, 66, 102, 104, 105, 108, 345, 348, 363, 373, 460	
Britain v. Cromford Canal..... 308, 576, 578, 587, 588	
British Empire Co. v. Southwark and Vauxhall	318
— Linen Co. v. Drummond ... 424	
— Plate Manufacturers v. Mere- dith	274
Broadbent v. Ramsbotham	189, 193
Broder v. Saillard..... 142, 161, 629	
Brown v. Best	229, 242, 267
— v. Gregg	95

	PAGE
Brown v. London (Mayor of)... 483, 554	
— v. Mallet	448, 450, 451
— v. Russell	632
— v. Windsor	207
Brownlow v. Metropolitan Board... 275, 447, 450, 470, 472, 482	
Bruce v. Willis..... 89, 91, 468, 606	
Brune v. Thompson	57, 563, 570
Bryan v. Whistler	207
Brymbo Water Co. v. Lester's Lime Co. 235, 238, 241, 250, 264, 312	
Buccleuch v. Cowan	159
— v. Metropolitan Board ... 96	
Buckeridge v. Ingram..... 309	
Bullock v. Dommit	541
Burling v. Read	625
Burlington, The	332
Burnis v. Brown	85
Burnley Co-Operative Society v. Pickles	531
Burrows v. Lang..... 214, 217, 237, 262	
Burton-on-Trent v. Egginton	600
Bury St. Edmunds v. West Suffolk. 521	
Bury v. Pope	230
Busby v. Chesterfield Water Co. 121, 316	
Bush v. Trowbridge... 311, 312, 315, 319	

C.

Calder and Hebble Navigation v. Pilling	397
Calmady v. Rowe	15, 23, 24, 374
Cambridge v. Harrison	399
Campbell v. Brown	14
— v. Lang	457
— v. London Waterworks... 320	
— v. Wilson	231
— Davys v. Lloyd..... 539, 540	
Canham v. Fisk	216
Cardiff (Mayor of) v. Cardiff Water Co. 316	
Carlisle (Mayor of) v. Graham... 69, 75, 82, 98, 101, 104, 345, 348, 357, 362, 432	
Carlyon v. Lovering... 230, 231, 240, 243	
Carstairs v. Taylor	143, 150, 151
Carter v. Murcott	43, 65, 98, 100, 345, 350
Case v. Midland Railway	307
Casher v. Holmes	576, 578
Cator v. Lewisham	159, 165, 172, 178, 247, 639
Cattle v. Stockton..... 137, 143, 315	
Cawkwell v. Russell... 161, 229, 254, 264, 267, 625	
Caygill v. Thwaite	405
Chad v. Tilsed	21, 25
Chadwick v. Marsden	210, 212
Chamber Colliery Co. v. Hopwood 112, 234, 237, 248, 256, 285	
Chancellor, The	424
Chapman v. Fylde Water Co. 314	

	PAGE
Dodd v. Burchell	219, 229
Doe d. R. v. York	19, 468
Doick v. Phelps	485
Don v. Lippmann	424
Doncaster Union v. Manchester S. & L. Railway	468, 606
Donegal v. Hamilton	361, 372, 643
— v. Templemore	24, 357, 358
Dore v. Gray	466
Douglas, The	451, 453
Dresser v. Bosanquet	586
Drewett v. Sheard	60, 231
Driver v. Simpson	33
Duckham v. Gibbs	331
Dudden v. Clutton Union	59, 60, 189
Dudley Canal v. Grazebrook	197, 200, 283, 281, 283
— Corporation, <i>In re</i>	313
Dukes v. Gostling	105
Dungarvan Guardians v. Mansfield	179, 240
Dunn v. Birmingham Canal	153, 197, 288, 292
Dunwich (Bailliff of) v. Sterry	45
Durrant v. Branksome Council	176, 178
Dutton v. Taylor	226
Dwyer v. Rich	81, 93, 100
Dyce v. Hay	457
Dyson v. Collick	277, 629

E.

East London Water Co. v. Charles	317
— v. Foulkes	318
— v. Keller- man	317
— v. Kyffin	317
— v. Leyton	621
— v. St. Mat- thew	313
— v. Mile End	621
East Molesey v. Lambeth	313, 636
Eastern Counties Railway v. Dor- ling	42, 94, 98, 437
Eastman v. Amoskeag	631
Eastwood v. Hanley	180, 185
Eaton v. Swansea Water Co.	238, 266
Eckroyd v. Coultard	100, 101, 337, 358, 364
Eddleston v. Crossley	84, 85, 100, 125, 171, 176, 638
Edgar v. Commissioners of Fisheries	98, 339, 341, 351, 353, 368
Edgemore v. Colne	311, 319
Edmonds v. Watermen's Company	487
Edwards v. Hall	309
Eglinton (Earl of) v. Norman	453
Egremont v. Putnam	629
Eldridge v. Nott	231
Elliot v. North Eastern Railway	174, 200, 639
Ellis v. Manchester	222, 243

	PAGE
Ellwell v. Birmingham Canal	235, 291, 299
— v. Crowther	122, 174, 633, 639, 640
Elmhirst v. Spencer	165, 171, 176
Elmore v. Hunter	487
Embleton v. Brown	15, 46, 76, 406
Embrey v. Owen	64, 113, 115, 116, 122, 125, 166, 167, 241, 632, 634
Emerald, The	453
English v. Burnell	343
Ennor v. Barwell	233
Evans v. Manchester S. & L. Rail- way	152, 269, 290, 292
— v. Owen	385
Ewart v. Belfast Guardians	189, 192, 195, 198, 199, 213, 227, 235
— v. Cochrane	217, 218
Excelsior, The	331
Exeter (Mayor of) v. Trimlett	560
— v. Warren	51, 54, 55, 411, 551, 552
Exeter Corporation v. Devon (Earl of)	467

F.

Falmouth v. George	50, 54, 57, 551, 552, 564
— v. Penrose	565
Farquharson's case	83, 85, 155
Fay v. Prentice	143, 629
Fennings v. Grenville	5, 344
Fentiman v. Smith	206, 216
Fenton v. Trent and Mersey	288
Ferrand v. Bradford	310
Fife v. George	400
Finch v. Birmingham Canal	280, 282
— v. Resbridge	231
Fineux v. Hoveden	94, 239, 643
Fisher v. Lee	593
— v. Moon	265
Fitch v. Rawling	456
Fitzgerald v. Firbank	344, 372
Fitzsimmons v. Inglis	141
Fitzwalter's case	43, 98, 345, 350, 362
Fletcher v. Rylands	146, 161, 315, 469
— v. Smith	137, 145
Flight v. Thomas	244
Fobbing Sewers Commissioners v. Reg.	36
Forbes v. Lee Conservancy	92, 303, 468, 473
Ford v. Lacy	30, 70, 72, 73, 101, 102
Foreman v. Free Fishers of Whit- stable	50, 51, 53, 54, 55, 82, 359, 408, 432, 434, 553, 560, 562, 566, 567
Forrest v. Greenwich	89, 603
Forward v. Pittard	150
Fosberry v. Waterford	537
Foster v. Bonner	502
— v. Wright	30, 31, 70, 75, 102, 361, 363
Frankum v. Falmouth	116, 121, 252

	PAGE		PAGE
Fraser v. Swansea Canal	303, 594	Grand Junction Canal v. King's	
Free Fishers of Faversham, <i>In re</i> ...	381	Langley ...	609
Free Fishers of Whitstable v. Fore-		r. Petty 88, 277	
man	562, 566, 567	v. Shugar ...	116,
French Hoek Commissioners v. Hugo	113,	122, 196, 640	
119, 121, 122, 237, 265		Water Co. v. Brent-	
		ford 318, 324	
G.		r. Davies 317	
Galgay v. G. S. & W. Railway Co.	190	Surrey Canal v. Hall	307
Gammel v. Woods and Forests.....	9, 12	Union Canal v. Ashby 280, 364,	
Gandy v. Jubber	632	377	
Gann v. Free Fishers of Whitstable 4, 5,		Grant v. Oxford.....	89, 604
9, 15, 16, 18, 40, 54, 55, 65, 80,		Grantham Canal v. Hall.....	590
82, 87, 98, 111, 350, 359, 408,		Gray v. Bond	27, 99, 234, 355, 359
410, 429, 432, 433, 434, 551,		Greasley v. Codling.....	634
556, 558, 562, 563, 566, 568,		Great Eastern Railway v. Harwich	555
642		Greatrex v. Hayward 189, 251, 261, 262	
Gardner v. Whitford	330	Green v. Chelsea Water Co. ...	152, 269
Garnett v. Backhouse	404	r. St. Katharine's Docks.....	555
"Garstin" sailing ship v. Hickie ...	50	Greenback v. Sanderson	405
Gateward's case	49, 338, 339, 343	Greenslade v. Halliday	623
Gautret v. Egerton	291, 306	Greenwich Board of Works v.	
Gaved v. Martyn	234, 237, 240, 254,	Maudslay	32, 33
256, 257, 259		Gregson v. Potter.....	553
Gazard v. Cooke	399	Greta Holme, The	453
Geddis v. Bann Reservoir... 137, 152, 153,		Grey's case	373
269, 276, 319, 469		Grey v. Brown	623
Gellatly's case	85	Griffith's case	38
George v. Carpenter.....	385	Griffiths v. Mann.....	125, 127
Gibson v. Inglis	331	Groucott v. Williams	469
Gifford v. Yarborough	29, 30, 76	Grove v. West	364
Gildart v. Gladstone 575, 576, 578, 584,		Gwynnell v. Eamer	632
587			
Giles v. Groves.....	506	H.	
Gill v. Edouin	142	Hadley v. Taylor	632
Gillon v. Boddington.....	629, 631	Hale v. Olroyd	266
Gipps v. Woollicot.....	340, 341, 643	Halifax v. Soothill	320
Glamorgan Canal v. Blakemore 276, 277		Hall v. Grantham Canal.....	590
Glannabanta, The	422	r. Laird.....	228
Glasgow Corporation v. Glasgow &		r. Reid.....	386
S. W. Railway	313	v. Swift	229, 243, 267
(Mayor of) v. Farie.....	312	Halley, The	424
Glave v. Harding	219	Halliday v. Wakefield (Mayor of)	288,
Glossop v. Halston Local Board	171,	312, 313	
173, 639		Hamelin v. Bannerman	92, 111
v. Isleworth Local Board... 185		Hamilton v. A.-G. for Ireland 27, 29, 48,	
Glover v. East London Waterworks 314		627	
Goldsmid v. Tunbridge Wells... 159, 165,		r. Davies	44
166, 174, 175, 177, 178,		r. Donegal	346, 359
244, 247, 637, 639		v. Eddington	85
Goodday v. Michel	254	r. Stow	575, 577
Goodhart v. Hyett	229	Hammersmith v. Brand	152
Goodman v. Saltash (Mayor of)... 43, 49,		Hampton Urban Council v. South-	
204, 230, 337, 338, 339, 352,		wark	596
367, 381, 515, 552		Hanbury v. Jenkins... 340, 355, 359, 364	
Goodson v. Richardson.....	321, 638	Handcock v. York and Newcastle	
Goody v. Penny	592	Railway	448
Goolden v. Conservators of Thames 478,		Harborough v. Shardlow ...	91, 295, 468
479, 481		Harbottle v. Terry	385
Gore v. Commissioners of Fisheries 403		Hardcastle v. South York Railway	320
Graham v. Ewart	364	Harden v. Smith	581
Grand Junction Canal v. Ashby ...	104	Hargreaves v. Diddams... 66, 98, 99, 103,	
v. Hemel		104, 340, 347, 367, 406, 467	
Hempstead 609		Harmond v. Pearson	451

INDEX TO CASES CITED.

XV

	PAGE
Harrington, The	453
Harris v. Baker	304
— v. Drewe	216
— v. Owners of the Franconia	3
Harrison v. Great Northern Railway	150, 151, 319
— v. Parker	206, 541
Harrop v. Hirst	165, 239, 633, 637, 640
Hart v. Barnett	634
Hartlepool Gas Co. v. West Hartlepool	313
Harvey v. Lyme Regis	580
— v. Walters	264, 267
Haspurt v. Wills...47, 54, 546, 547, 548, 549, 558, 574	
Hastings v. Ivall	22, 23
Hayes v. Bridges... 339, 341, 343, 353, 363, 370	
Hayward v. East London	316
Head v. Tillotson	399
Healey v. Thorne..... 24, 25	
Heddy v. Wheelhouse	57, 354, 502, 555
Hedges v. London and St. Katharine Docks Co.	330
Henry v. Newcastle Trinity House	425
Herbert v. Groves	94
Herdman v. North Eastern Railway	141, 161
Hertz v. Union Bank	219
Heshod v. Wills	548, 558, 574
Hewlins v. Shippam...204, 206, 207, 210	
High Wycombe v. Thames Conservators.....	181, 481
Hildreth v. Adamson	311
Hill's case	625
Hill v. Cock	267, 623, 624
— v. George	398
— v. Smith	54, 547, 550
— v. Tupper	204, 216, 278
— v. Wallasey Local Board...314, 324	
Hinchcliffe v. Kinnoul	229
Hind v. Mansfield	438
Hindson v. Ashby	30, 31, 62, 66, 73, 97, 98, 99, 101, 107, 340, 348, 357, 363, 478
Hipkins v. Birmingham... 137, 144, 160, 181	
Hodgkinson v. Ennor ... 142, 161, 162, 177, 200, 250	
Hodgson v. Little..... 404	
— v. York (Mayor of)	92, 136, 301, 468, 469
Hogarth v. Jackson	344
Holcroft v. Keel	231
Holford v. Bailey	74, 104, 340, 341, 342, 343, 356, 363, 364, 368, 369, 643
— v. George	352, 360, 361
— v. Pritchard	342, 343, 401
Holker v. Porrit	62, 116, 117, 119, 127, 131, 132, 159, 169, 634
Holland v. Deakin	217
Holmfirth Local Board v. Shore ...	179
Hollis v. Goldfinch	89, 91, 468
Holmes v. Seller	216
Hopkins v. Great Northern Railway	508

	PAGE
Hopkins v. Robinson	343
Hopton v. Thirlwall	394
Hopwood v. Schofield	629
Horne, <i>Ex parte</i>	309
— v. Mackenzie..... 69, 349	
Hoskins v. Robins	206
House v. Chapman	309
Howard v. Ingersoll..... 62	
— v. Wright	241
— Smith v. Wilson	453
Howe v. Stawell	48
Hubert v. Groves..... 626, 634, 643	
Huddersfield Canal v. Buckley	308
— Corporation and Jacobcomb, <i>In re</i>	314
Hudson v. Macrae	66, 104, 347, 367, 406
— v. Maddison	631
— v. Tabor	31, 34, 449, 461, 462, 465
Hughes v. Buckland	405
Hull (Mayor of) v. Horner..... 231	
— and Selby Railway, <i>In re</i>	30, 31, 66, 71, 72, 76
— Dock Co. v. Browne	575, 576, 578, 581, 587
— v. Huntingdon	585
— v. La Marche... 46, 276, 330, 336, 551, 574	
— v. Priestley	581
Hume v. McKenzie	65
Humphries v. Cousins	142, 161
Hungerford Market Company v. City Steamboat Company... 553, 587, 592	
Hunter v. Northern Marine Insurance Co.....	50
Huntingdon, Case of the County of	522
Huzzey v. Field	436, 501, 505, 506, 507, 510
Hyams v. Webster	632

I.

Ilchester (Earl) v. Rashleigh	13, 14, 15, 16, 42, 43, 46, 65, 67, 98, 346, 358, 430
Imperial Gas Company v. Broadbent	165, 637
Industrial Dwellings Co. v. East London.....	316, 318
Inman v. Kirkdale	600
Ion v. Ashton	581
Ipswich v. Brown	358, 515
— Dock v. St. Peter's, Ipswich	13, 595
Isaie Frechette v. St. Hyacinthe ...	242
Ile of Ely Case	36, 39
Itchin v. Southampton	472
Iveson v. Moore	94
Ivimey v. Stocker	230, 234, 239, 240, 254

J.

Jackson v. Peaked	629
— v. Stevenson	387

	PAGE		PAGE
James v. Hayward	625	Langridge v. Levy	143
— v. Johnson	548, 550	Laurence v. Hitch	550, 553
— v. Plant	265	Lawrence v. Great Northern Rail- way	152, 154
Jean v. Holland	33, 466	Lawton v. Ward	625
Jehu Jebb's case	515	Layburn v. Crisp	552
Jenkins v. Cooke	594	Lea v. Abergavenny Commissioners	317
— v. Harvey 53, 55, 230, 231, 551, 552, 563		Leader v. Moxon	274
Joanna Stoll, The	12	Leath v. Vine	406
Johnson v. Barrett	10, 23	Leconfield v. Lonsdale	231, 346, 361, 371, 372, 446, 643
— v. Wyatt	265	Lee v. Brown	24
Johnstone v. Hall	629	Lee Conservancy v. Button	89, 468
Jolliffe v. Wallasey	450	— v. Milner	289
Jones v. Bird	274	— v. Brown	24
— v. Chappell	629	Leech v. Schweder	166
— v. Davies	398	Leeds and Liverpool Canal v. Hustler ...	277, 307, 330, 576, 578, 587, 590
— v. Ffestiniog	140, 152	Lees v. Manchester and Ashton Canal	554, 587, 591
— v. Mersey Dock	601, 621	Legge v. Boyd	45
— v. Phillips	578	Leigh v. Burley	1, 13
— v. Price	233	— v. Jack	101
— v. Williams	22, 625, 631	Letton v. Gooden	501, 505, 509
— and Eastern Counties Rail- way, <i>In re</i>	308	Leveridge v. Hoskins	622
K.		Lewis v. Arthur	399
Kavanagh v. Glorney	399	— v. Swansea	597
Kearns v. Cordwainers' Co. 97, 449, 482		Lifford's case	358
Keighley's case	35, 36, 39	Liggins v. Inge	113, 209, 266
Kemp v. Worthing Local Board ...	314	Lillywhite v. Trimmer	171, 176, 640
Kennet and Avon Co. v. Great Wes- tern Railway	303	Lingwood v. Stowmarket	176, 177, 641
— v. Withering- ton ...	290, 306	Liskeard Union v. Liskeard	316
Kensit v. Great Eastern Railway Co. 118, 124, 134, 175, 250, 252,	254	Listrage v. Rowe	24, 27
Keppel v. Bailey	308	Little v. Wingfield	351, 354
Keymer v. Summers	231	Littledale v. Scaith	344
Kidgell v. Moor	629	Liverpool (Mayor of) v. Wavertree	617
Kimberley Water Co. v. De Beers ...	321	— Docks v. Gladstone	585
King's Lynn (Mayor of) v. Pembro- ton	291	— Corporation v. Chorley Water Co.	152
Kingston-on-Hull Docks v. La Marche	53, 331	— v. Llanfyllin	616
Kinnersley v. Orpe	340, 368	— v. West Derby ...	617
Kintore v. Forbes	355, 360	Llandudno Council v. Woods ...	47, 638
Kirkheaton Board v. Ainslie ...	184, 187	Llewelyn v. Swansea	305
Knowles v. Lancs. and Yorks. Rail- way	282, 285	Lloyd v. Iron	331
Kyffin v. East London Water Co. ...	327	— v. Jones	627
L.		Lodie v. Arnold	625
Lacon v. Cooper	344	London (Alderman of) v. Hastings	342, 370
Ladyman v. Grave	233	— Association of Shipowners v. London and Indian Docks	330, 629
Laird v. Birkenhead	208	— County Council v. Erith	597, 600
— v. Briggs	47, 49, 629	— (Mayor of) v. Hunt ...	54, 549, 560, 564
Lamb v. Newbiggen	104, 364	— and Birmingham Railway v. Grand Junction Canal ...	276
Lancashire Canal Co., <i>Ex parte</i>	309	— and North Western Railway v. Evans	286
— The	514	— and North Western Railway v. Ogwen	537
Lancaster Canal v. Parnaby	331	— and North Western Railway v. Skerton	537
Lancum v. Lovell	554		
Lane v. Newdigate	303		
Lang v. Kerr	291, 292		

	PAGE
London and North Western Railway v. Fobbing Level Commis- sioners	35, 38, 230
----- Port Sanitary Authority v. Thames Conservators.....	19, 81, 181, 480
Londonderry Bridge v. McKeever	502, 503
Lonsdale v. Nelson	540
Lopes v. Andrews.....	23
Lord v. Commissioners of Sydney...	16, 19, 81, 100, 107
Lord Advocate v. Blantyre ...	22, 23, 25
----- v. Hamilton	65
----- r. Lovat ...	26, 342, 350, 353, 355, 360
----- r. Sinclair 342, 351, 355	
----- r. Wemyss 10, 14, 19, 21,	24
----- r. Young...14, 21, 24, 26,	28, 29
Lovett v. Wilson	231
Lowden v. Hierons	581
Lowe v. Govett	14, 49
Lowndes v. Bettle	637
Lumley v. Gye	143
Luttrell's case	229, 243, 267, 625
Lyme Regis Corporation v. Henley	35, 636
Lyne v. Leonard	399
Lynn (Mayor of) v. Tayler	49
----- r. Turner	67, 430
Lyon v. Fishmongers' Co. 42, 63, 65, 67,	73, 92, 93, 95, 96, 110, 111, 112, 363, 436, 447, 449, 479, 482, 632, 643
M.	
Macalister v. Campbell	21
Mace v. Philcox	48
Macey v. Metropolitan Board of Works	96
McCannon v. Sinclair	14, 76, 596
McDonall v. Lord Advocate.....	342, 355
McEvoy v. Great Northern Rail- way	61, 236
Mackinnon v. Penson	635, 636
McIntyre v. McGavin	244
Macnab v. Robertson.....	59, 195, 198
Macnamara v. Higginson	49
Maddock v. Wallasey Board	40
Madras Railway v. Zemindar of Carventenagarum.....	150, 152
Magor v. Chadwick...131, 162, 200, 201, 251, 259, 261, 264, 300	
Malcolmson v. O'Dea...15, 16, 43, 65, 98, 340, 341, 345, 350, 351	
Maldon Corporation v. Wolvet	382
Manchester and Sheffield Railway v. Doncaster	606
Manchester and Sheffield Railway v. Worksop.....	161, 173, 177, 178, 641
Manchester Ship Canal v. Rochdale	235, 301

	PAGE
Manley v. St. Helen's...92, 275, 291, 306, 530, 594	
Manning v. Walsdale.....	204, 231, 239
Manser v. North Eastern Counties Railway	531
Manuel v. Fisher	351
Margaret, The	428
Margate Local Board v. Margate Harbour Co.	48, 53
Maria, The.....	425
Marshall v. Nicholls	340
----- r. Richardson ...	398
----- r. Ulleswater Co. ...	41, 74, 87, 93, 97, 104, 106, 107, 108, 341, 356, 363, 368, 369, 375, 436, 456, 460
Martin v. Temperley	487
Mason v. Hill.....	64, 113, 116, 117, 120, 121, 125, 134, 177, 242, 633
----- v. Shrewsbury...93, 108, 121, 129, 136, 205, 231, 232, 237, 241, 258, 266, 301, 631	
Mathews v. Peach	506
Matson v. Scobell	576
Medway Navigation v. Brooks	592
----- r. Romney ...	61, 120, 633
Menzies v. Breadalbane...61, 83, 85, 137, 141, 154, 155, 157, 158	
Merrick v. Cadwallader	386
Mersey Docks v. Birkenhead	600
----- r. Cameron	554, 601
----- r. Gibb...55, 92, 137, 138, 171, 268, 273, 291, 303, 329, 331, 332, 334, 469, 470, 472, 473, 554, 594	
----- r. Hunter.....	581
----- r. Liverpool	599, 602
----- r. Llanellan.....	605
Merthyr Tydfil Local Board v. Merthyr Tydfil	619
Metcalfe v. Hetherington	332, 453
Metropolitan Association v. Petch..	629
----- Board v. London and N.W. Rail- way...171, 175, 181, 247, 638	
----- r. McCarthy ...	96
----- r. New River Co. ...	311, 318
Micklethwaite v. Newlay Bridge Co. 101, 502, 530	
----- r. Vincent ...	107, 108, 349, 376, 460
Middleton v. Lambert.....	550
Midland Railway v. Checkley...197, 281	
Miles v. Rose.....	68, 430
Miller v. Little.....	357
Millington v. Griffiths	181
Mills v. Colchester	381
Milnes v. Huddersfield	316
Miner v. Gilmour...64, 93, 112, 122, 126, 129, 253, 634	
Mississippi, Case of the Navigation of the	78

	PAGE
Mold <i>v.</i> Wheatcroft.....	279, 280
Monk <i>v.</i> Butler.....	206
Monmouth Canal <i>v.</i> Hill.....	276, 280
<i>v.</i> Kendal	591
Monte Rosa, The	428
Montreal (Mayor of) <i>v.</i> Drummond	95
Moore <i>v.</i> Lambeth Water Co.	314
<i>v.</i> Webb.....	176, 243, 245, 247
Morland <i>v.</i> Cooke	39
Morris <i>v.</i> Duncan.....	393
Moss <i>v.</i> Mersey Docks.....	580
Mostyn <i>v.</i> Atherton.....	60, 179, 196, 197
Mott <i>v.</i> Shoolbred	629
Moulton <i>v.</i> Wilby.....	400
Moxham, The Mary.....	424
Mulholland <i>v.</i> Killen.....	25
Mulliner <i>v.</i> Midland Railway Co....	88
Mumford <i>v.</i> Oxford Railway	629
Murchie <i>v.</i> Black.....	219
Murgatroyd <i>v.</i> Robinson.....	243
Murphy <i>v.</i> Ryan....	17, 65, 66, 69, 96, 97, 98, 99, 103, 104, 345, 347, 348, 349, 357, 361, 362, 363, 367, 372
Musset <i>v.</i> Burch.....	66, 98, 99, 103, 104, 340, 347, 367, 467
Mussumat Imaum Bendi <i>v.</i> Hergo- vind Ghose.....	29, 31

N.

National Manure Co. <i>v.</i> Donald ...	232, 235, 265, 277, 278
— Plate Glass Co. <i>v.</i> Pruden- tial Assurance Co.	243
Neath Canal <i>v.</i> Ynisaewed Colliery	279
Neill <i>v.</i> Devonshire (Duke of)....	337, 339, 347, 351
Newby <i>v.</i> Harrison	295
Newcastle <i>v.</i> Clarke.....	18, 33, 437
Pilots <i>v.</i> Bradley	570
<i>v.</i> Hammond	570
New Moss Colliery <i>v.</i> M. S. & L. Railway Co.	285
Newport Bridge, <i>In re</i>	516, 535
New River Co. <i>v.</i> Johnson....	62, 196, 315
<i>v.</i> Mather.....	311, 319
<i>v.</i> Midland Rail.	312, 320
<i>v.</i> St. Pancras	614
New Shoreham <i>v.</i> Lancing.....	597
Newton <i>v.</i> Cubitt.....	501, 507, 510, 512, 513
Nicholas <i>v.</i> Chamberlain....	217, 218, 223, 225, 229
Nicholl <i>v.</i> Allen.....	530, 531, 532
Nichols <i>v.</i> Marsland.....	37, 137, 147, 151
Nicholson and the South West. Rail- way, <i>In re</i>	308
<i>v.</i> Williams.....	19, 52
Nield <i>v.</i> London & North West. Railway.....	150, 157, 158, 293, 294
Nitro-phosphate Co. <i>v.</i> London Docks	36, 37, 151
Norbury <i>v.</i> Kitchin	121, 124
Northam <i>v.</i> Hurley ...	210, 212, 213, 633

North East. Railway <i>v.</i> Elliot ..	312, 320
— Shore Railway <i>v.</i> Pion ...	40, 42, 63, 92, 95, 96, 97, 111, 112, 436, 453
— & South Shields <i>v.</i> Barber...	503
Northumberland <i>v.</i> Houghton....	350, 353, 354
Norton <i>v.</i> Scholefield	176
Norwich & Lowestoft <i>v.</i> Theobald...	308
Nottingham (Mayor of) <i>v.</i> Lambert	502, 546, 547, 550, 551, 556, 557, 559, 566
— County Council <i>v.</i> Man- chester S. & L. Railway	537
Nugent <i>v.</i> Smith	149, 514
Nuneaton <i>v.</i> General Sewage Co. ...	635
Nuttall <i>v.</i> Bracewell....	117, 118, 121, 124, 126, 128, 132, 133, 134, 135, 162, 164, 204, 216, 254

O.

Oakley <i>v.</i> Kensington	303
Oldaker <i>v.</i> Hunt	171, 177, 178, 372, 638, 643
Olding <i>v.</i> Wild	408
O'Neil <i>v.</i> McElaine	347, 358
O'Neill <i>v.</i> Allen	43
Only <i>v.</i> Gardiner	233
Ordway <i>v.</i> Orme.....	343
Orford (Mayor of) <i>v.</i> Richardson ...	43
Original Hartlepool Colliers <i>v.</i> Gibb	40, 82, 97, 408, 434
Ormerod <i>v.</i> Todmorden Mill Co. ...	118, 131, 136, 162, 164, 203
Orr-Ewing <i>v.</i> Colquhoun....	67, 81, 82, 83, 85, 87, 99, 100, 102, 111, 117, 120, 126, 137, 154, 348, 363, 371, 408, 430, 432, 438, 440, 454, 456, 634
Outram <i>v.</i> Maude.....	234
Owen <i>v.</i> Davies	124, 208
Oxlade, <i>In re</i>	308

P.

Padwick <i>v.</i> Knight.....	346
Paget <i>v.</i> Milles	342
Pain <i>v.</i> Patrick.....	634
Paley <i>v.</i> Birch	405
Palk <i>v.</i> Skinner.....	233
Palmer <i>v.</i> Conservators of Thames	481
<i>v.</i> Fletcher	219, 223
<i>v.</i> Perse.....	83, 84, 86
<i>v.</i> Rouse	45
Paradine <i>v.</i> Jane	151
Parkdale (Corporation of) <i>v.</i> West	96
Parmeter <i>v.</i> A.-G.....	642
Parnaby <i>v.</i> Lancaster Canal....	92, 273, 276, 291, 303, 451, 453, 470, 473, 554, 594
Parrett Navigation <i>v.</i> Robins ...	92, 137, 468, 469

	PAGE
Partheriche <i>v.</i> Mason	362
Partridge <i>v.</i> Bere	629
Patrick <i>v.</i> Beaufort	91, 296, 468
Pauline, The	45, 46
Payne <i>v.</i> Partridge	502, 509, 513, 515
Pearce <i>v.</i> Bunting	62, 478, 479
— <i>v.</i> Scotcher	66, 98, 103, 104, 340, 347, 348, 363
Pearson <i>v.</i> Spencer	217, 219, 229
Peebles <i>v.</i> Oswaldwhistle	180, 185, 187, 639
Peirce <i>v.</i> Fauconberg	87
Pelham <i>v.</i> Pickersgill	547, 550, 551
Pendleby <i>v.</i> Greenhalgh	632
Pennington <i>v.</i> Brinsop Hall	116, 159, 160, 165, 166, 177, 247, 633, 637, 639, 640, 641, 642
— <i>v.</i> Galland	226
Penruddock's case	625, 625, 631
Penryn (Mayor of) <i>v.</i> Holme	15
Perkins <i>v.</i> Gingell	487
Pernacott or Parnacott <i>v.</i> Passmore	387
Perrot <i>v.</i> Bryant	15
Perry <i>v.</i> Fitzhowe	207, 625
Pery <i>v.</i> Thornton	108, 375
Peter <i>v.</i> Daniel	229
— <i>v.</i> Kendal	459, 502, 505, 515
Peterborough's (Abbot of) case	29
Peterborough Corporation <i>v.</i> Stam- ford	619
Peto <i>v.</i> West Ham	598
Pheysey <i>v.</i> Vicary	217
Phillips <i>v.</i> Eyre	424
Pickard <i>v.</i> Smith	632
Pidgeon <i>v.</i> Great Yarmouth Water Co.	316
Pierce <i>v.</i> Lord Fauconberg	87
Piercy <i>v.</i> Pope	312
Pike <i>v.</i> Roositer	404
Pim <i>v.</i> Currel	502, 504
Pitman <i>v.</i> Woodbury	555
Pitts <i>v.</i> Kingsbridge	49
Plata, Case of the Navigation of the River	78
Plimmer <i>v.</i> Wellington (Mayor of)	10, 96
Polden <i>v.</i> Bastard	217
Pollock <i>v.</i> Lester	631
— <i>v.</i> Moses	391
Poole <i>v.</i> Johnson	576
Poplar Board <i>v.</i> Knight	462
Popplewell <i>v.</i> Hodgkinson	199
Portsmouth Harbour case	444
Powell <i>v.</i> Butler	255
— <i>v.</i> Thomas	208
Preston (Mayor of) <i>v.</i> Fulwood	321
— <i>v.</i> Norfolk Railway	276, 290, 632
Pretty <i>v.</i> Bickmore	632
— <i>v.</i> Butler	343
Price <i>v.</i> Bradley	396
Prideaux <i>v.</i> Warne	559
Priest <i>v.</i> Archer	364
Priestley <i>v.</i> Foulds	303
— <i>v.</i> Manchester and Leeds Railway	490, 530

	PAGE
Prior of Tynemouth's case	87
Pryce <i>v.</i> Monmouthshire Canal	546
Pryor <i>v.</i> City Offices Co.	628
Pullan <i>v.</i> Roughfort Bleaching Co.	117, 134, 217, 228
Puller <i>v.</i> Berry	387
Purnell <i>v.</i> Wolverhampton	316
Pye <i>v.</i> Mumford	233
Pyer <i>v.</i> Carter	212, 217, 218, 219, 220, 221, 222, 224, 225, 226, 227, 229

Q.

Queen of the River Co. <i>v.</i> Thames Conservators	482
---	-----

R.

Race <i>v.</i> Ward	49, 204, 231, 239, 347, 367
Raikes <i>v.</i> Townshend	623
Rameshur Pershad <i>v.</i> Koonj Behari	108, 112, 134, 250, 252, 263
Ramsay's (Abbot of) case	29
Ramsden <i>v.</i> Dyson	208
Ranfurley, <i>Ex parte</i>	19, 23
Ratata, The	333
Rawstorne <i>v.</i> Backhouse	352, 360, 401
Rawstron <i>v.</i> Taylor	60, 188, 193, 212
Read <i>v.</i> Brookman	231
Rebeckah, The	44, 45
Reece <i>v.</i> Miller	14, 65, 66, 68, 348
Reed <i>v.</i> Ingham	486
Reeve <i>v.</i> Digby	364
Regent's Canal <i>v.</i> Hendon	609
— <i>v.</i> St. Pancras	610
Regina <i>v.</i> Adderbury	536, 544, 636
— <i>v.</i> Anderson	3, 409
— <i>v.</i> Atkins	488
— <i>v.</i> Aylesbury	621
— <i>v.</i> Baker	38
— <i>v.</i> Barker	538
— <i>v.</i> Bedfordshire	516, 543, 636
— <i>v.</i> Betts	18, 63, 68, 69, 432, 438, 445, 467, 642
— <i>v.</i> Blackfriars	621
— <i>v.</i> Bradford	173
— <i>v.</i> Brecon	537, 538
— <i>v.</i> Bristol Dock	55, 329, 334, 335, 598, 620
— <i>v.</i> Buccleuch	542
— <i>v.</i> Bucknell	538
— <i>v.</i> Burrow	107, 108, 349, 375, 406
— <i>v.</i> Cambrian Railway	503, 508
— <i>v.</i> Cambridge Gas Company	616
— <i>v.</i> Chart	526
— <i>v.</i> Chorley	266
— <i>v.</i> Clark	18
— <i>v.</i> Clinton	49
— <i>v.</i> Coventry Canal	613
— <i>v.</i> Cubitt	381
— <i>v.</i> Darlington	178

	PAGE		PAGE
Regina v. Delamere	276, 288	Regina v. North and South Shields..	607
— v. Derbyshire.....	61, 515	— v. Paynter.....	620, 621
— v. Dibble	486	— v. Peak	406
— v. Dowlais	604	— v. Petrie	233
— v. Downing.....	23, 352	— v. Plymouth Corporation ...	383
— v. Durham	605	— v. Pomfret	403
— v. East London Waterworks	621	— v. Randall.....	15, 96, 432
— v. East and West India		— v. Rhymney Railway Co. ...	600
Docks	530	— v. Russell.....	83, 439
— v. Ely ... 522, 524, 525, 526,	531, 532	— v. St. George the Martyr ...	620
— v. Eyre.....	620	— v. St. Mary, Islington.....	616
— v. Forrest.....	603	— v. Saintiff	522, 524, 529
— v. Gamble	39	— v. Salisbury	550, 555, 620, 636
— v. Gee	15, 68	— v. Samuel	477
— v. Giles	487	— v. Sattler	3, 409
— v. Glamorgan Canal	609	— v. Simpson.....	552, 553, 589
— v. Gloucester.....	518, 533	— v. Smith	608
— v. Godmanchester	462	— v. Somerset	534
— v. Grand Junction Canal ...	609	— v. Southampton ... 518, 522, 530,	531, 532, 534, 538, 600, 601
— v. ——— Railway	616	— v. South Staffordshire Water	
— v. Great Northern Railway	503	Co.	614
— v. Grey.....	385	— v. Southwark and Vauxhall	
— v. Grosvenor	18	Co.	621
— v. Hammersmith	621	— v. Steer	373
— v. Henley	391	— v. Stephens	438
— v. Holme Reservoirs	614	— v. Stimson.....	345, 350, 353, 406
— v. Hornsea	34	— v. Stratford	534
— v. Hull Dock	598, 599	— v. Surrey	544
— v. Irish Fisheries Inspectors	400	— v. Sutton	543
— v. Kentmere	617	— v. Thames and Isis Naviga-	
— v. Kerrison	524, 532	tion	287
— v. Keyn...1, 2, 4, 5, 6, 7, 8, 9, 10,	13, 15, 59, 76, 344, 358,	— v. Tibble	485
393, 409, 410		— v. Tyne Commissioners..	601, 602
— v. Kitchener.....	524, 529, 531	— v. Wandsworth	522
— v. Landulph.....	100	— v. Wells Water Co.....	318
— v. Lapley Overseers	613	— v. West Middlesex	616
— v. Leach	438	— v. Wharton	38, 39
— v. Leeds and Liverpool Canal	295	— v. Wigg.....	634
— v. Leith.....	603, 604	— v. Wilts and Berks Canal ...	287
— v. Lesley.....	3, 409	— v. York (Archbishop of)	91, 278, 468
— v. Lincoln	536	— v. Yorks. County Council ...	383
— v. London (Mayor of)	354	Reney v. Kirkcudbright	331
— v. ——— Dock	335	Rex v. Aire and Calder Navigation	89,
— v. ——— and South Western		468, 588, 606, 611	
Railway	616	— v. Baptist Mill.....	254
— v. ——— School Board.....	600	— v. Barnes	620
— v. Longton	321	— v. Bath (Mayor of)	614, 615
— v. Longwood	617	— v. Bilston	614
— v. McCann	620	— v. Bird	636
— v. Mathews	487	— v. Bridgwater	613
— v. Merionethshire	636	— v. Bristol	464
— v. Metropolitan Board ...	60, 96,	— v. Buckingham (Marquis of)...	525
194, 614		— v. Bucks.....	536, 635
— v. Middle Level Commis-		— v. Calder and Hebble Naviga-	
sioners.....	531, 533	tion	611
— v. Mile End	615, 621	— v. Cardington	611, 612
— v. Morrison	604	— v. Chaplin.....	606, 611
— v. Musson	14, 15, 16, 46, 76,	— v. 49 casks of Brandy.....	44, 45
406, 596		— v. 2 casks of Tallow	46
— v. Neath Canal Co.....	610	— v. Chelmer Navigation	609
— v. Newport	596	— v. Chelsea	614
— v. New River Co.....	616	— v. Clarke	18
— v. New Sarum	537		

INDEX TO CASES CITED.

xxi

	PAGE		PAGE
<i>Rex v. Coke</i>	605	<i>Rex v. Oxfordshire</i>	58, 61, 524, 526,
<i>r. Crunden</i>	48		527, 528, 531, 538, 542
<i>r. Cumberland</i>	534	<i>r. Page</i>	588, 611
<i>r. Derbyshire</i> ...	518, 526, 527, 533	<i>r. Pagham Level Commis-</i>	
<i>r. Devon</i> ...	518, 525, 533, 534, 536,	<i>sioners</i>	39, 154, 158
	537	<i>r. Palmer</i>	611
<i>r. Dorset J.J.</i>	636	<i>r. Paul (Inhabitants of)</i>	39
<i>r. Douglas</i>	68	<i>r. Pease</i>	152, 171, 173, 274
<i>r. Dudley Canal Co.</i>	609, 612	<i>r. Pedley</i>	631
<i>r. Ecclesfield</i>	543	<i>r. Penegoes</i>	541
<i>r. Ellis</i> ...	27, 99, 358, 366, 370, 607	<i>r. Portmore</i>	606
<i>r. Essex, Commissioners of</i>		<i>r. Randall</i>	18, 103, 438
<i>Sewers for</i>	36	<i>r. Rebow</i>	605
<i>r. Glamorganshire</i> ...	305, 526, 589	<i>r. Regent's Canal</i>	609
<i>r. Gloucester</i>	536	<i>r. Rochdale</i>	614
<i>r. Grand Junction Canal</i>	609	<i>r. Russell</i> ...	40, 408, 435, 438, 441,
<i>r. Grosvenor</i>	18, 83, 437, 441		442, 443, 444, 634
<i>r. Hampshire</i>	554	<i>r. St. Austell</i>	254
<i>r. Hayman</i>	538, 542	<i>r. St. Mary's, Leicester</i>	611
<i>r. Hendon</i>	543, 544, 635	<i>r. St. Peter the Great</i>	609
<i>r. Hodges</i>	405	<i>r. Salop</i>	524, 529
<i>r. Hollis</i>	441	<i>r. Severn and Wye</i>	88
<i>r. Houldgrave</i>	636	<i>r. Smith</i>	65, 68
<i>r. Hull Dock</i>	598, 602, 606, 609	<i>r. Somerset (Commissioners of</i>	
<i>r. Hunsdon</i>	373	<i>Sewers for)</i>	36, 500
<i>r. Jones</i>	575, 577, 623	<i>r. Southampton</i>	636
<i>r. Kent</i>	517, 524, 525, 530, 531,	<i>r. Stainforth</i>	296
	532	<i>r. Staffordshire Canal</i>	611
<i>r. Kerrison</i>	529, 531, 538, 541	<i>r. Stratford</i>	544, 545
<i>r. Kingswinford</i>	611, 616	<i>r. Surrey</i>	535
<i>r. Lancashire</i>	518, 533, 635	<i>r. Sutton</i>	538, 539
<i>r. Landulph</i>	76, 100	<i>r. Thames and Isis</i>	484
<i>r. Leeds and Liverpool Canal</i>	611	<i>r. Thomas</i>	39, 91, 468, 606
<i>r. Leeke</i>	88, 277	<i>r. Tindall</i>	83
<i>r. Leicestershire Canal</i>	308	<i>r. Trafford</i>	154, 528
<i>r. Leigh</i>	36, 151	<i>r. Trent and Mersey Canal</i> ...	608,
<i>r. Lincoln</i>	534, 545		609
<i>r. Lindall</i>	634	<i>r. Tynemouth</i>	605
<i>r. Lindsey</i> ...	306, 524, 529, 531, 532	<i>r. Ward</i>	40, 438, 441, 442, 634,
<i>r. London (Mayor of)</i>	89, 354		642
<i>r. Lower Mitton</i>	612, 613	<i>r. Watts</i>	448, 451
<i>r. Macdonald</i>	612, 613	<i>r. West Middlesex Water Co.</i>	614
<i>r. Machynleth</i>	636	<i>r. Wharton</i>	62, 100
<i>r. Manchester Waterworks</i> ...	621	<i>r. Whitney</i>	526, 562, 635
<i>r. Marsden</i>	501	<i>r. Winstanley</i>	581
<i>r. Medley</i>	634	<i>r. Woking</i>	616
<i>r. Mersey and Irwell</i> ...	89, 91, 468,	<i>r. Worcester Canal</i>	309
	606	<i>r. Yarborough</i> ...	29, 30, 71, 72, 76
<i>r. Middlesex</i>	538, 542	<i>r. Yorkshire (West Riding)</i> ...	516,
<i>r. Miller</i>	615		517, 522, 524, 526, 529,
<i>r. Milton</i>	611		534, 542, 545, 635
<i>r. Mirfield</i>	602	<i>— (Doe d.) r. York</i>	19
<i>r. Monmouthshire</i>	609	<i>Reynolds v. Clarke</i>	622
<i>r. Montague</i> ...	67, 82, 430, 432, 434,	<i>Rhine, Case of the Navigation of</i> ...	78
	437	<i>Rhosina, The</i>	331, 332
<i>r. Morris</i>	634	<i>Ribble Navigation v. Hargreaves</i> ...	579
<i>r. Nene Outfall</i>	289	<i>River Committee v. Halli-</i>	
<i>r. New River Co.</i>	615, 616	<i>well</i>	183, 187
<i>r. Nicholson</i>	275, 606, 607, 611,	<i>Rich v. Basterfield</i>	632
	612	<i>r. Kneeland</i>	514
<i>r. Northampton</i>	525, 635	<i>Richards v. Fry</i>	233
<i>r. North Duffield</i>	515	<i>r. Richards</i>	279
<i>r. Oldacre</i>	29	<i>r. Rose</i>	219, 226, 227, 228
<i>r. Oswestry</i>	544, 545	<i>r. West Middlesex Water</i>	
<i>r. Oxford Canal</i>	609, 611	<i>Co.</i>	817

	PAGE		PAGE
Richardson v. Gray	358	Sampson v. Hoddinot 113, 116, 121, 126, 127, 204, 238, 241, 244, 633	
Richmond and Southwark v. Rich- mond	325	— v. Savage	629
Rickards v. Bennett	547, 550	Sandwich v. Great Northern Rail- way	121, 124
Ricket v. Metropolitan Railway ...	634	Sargent v. Reed	53
Ridge v. Midland Railway 154, 155, 176		Saunders v. Newman...115, 127, 241, 242	
Ripon v. Hobart	200, 633, 639	Saxby v. Manchester Railway...625, 632	
Riviere v. Bower	219	Saxonia, The	12, 409, 424
Robbins v. Jones	632	Scott v. Shepherd	158
Roberts v. Gwyrfai District Council 125		— v. Tylor	581
— v. Rose.....	624	Scrotten v. Brown.....14, 27, 75, 76, 99, 355, 370	
— v. Richards	134, 252	Seebkristo v. East India Co....29, 30, 65	
Robertson v. Johnson	382, 393	Serjeant v. Reed	562, 571, 573
Robins v. Warwick Canal ...91, 279, 295		Seymour v. Courtenay 340, 341, 342, 364	
Robinson v. Addison	309	Shadwell v. Hutchinson.....	631
— v. Byron	122, 637, 640	Shand v. Henderson...136, 290, 296, 297, 299, 302, 303, 638	
— v. Warwick	468	Shandrigany v. Sholedam	462
Rochdale Canal v. King ...120, 122, 136, 208, 279, 290, 302, 303, 638, 640		Sharp v. Powell	143
— v. Radcliffe.....61, 230, 235, 236, 245, 278, 279, 300, 301, 302, 637, 638		— v. Waterhouse	248
Rogers v. Allen	339, 340, 341, 353	Shaw's Water Co. v. Greenock	316
— v. Brenton	254	Shears v. Wood	127
— v. Oxford Railway	296	Sheffield United Gas Co. v. Sheffield 614	
Rolfe v. Rolfe	143	— Water Co. v. Bennett.....	317
Rolle v. Whyte...231, 237, 361, 371, 372, 404, 446		— v. Bingham ...	318
Rook v. Liverpool	317	— v. Carter	318
Rooke's case	36, 39, 643	— v. Wilkinson ...	316
Rose v. Groves...94, 437, 447, 632		Shoebottom v. Egerton	291, 306
— v. Miles ...18, 67, 83, 437, 447, 634		Shoreham v. Lancing	597
Ross v. Fedden	143	Short v. Tayler	208
Rossiter v. Pike	404	Shroeder v. Smith	581
Roswell v. Prior	631	Shuttleworth v. Le Fleming ... 204, 339, 353, 358	
Rothes (Countess of) v. Kirkaldy ... 151		Sidebottom v. Glossop.....	317
Rowbotham v. Wilson.....	216	Simper v. Foley	265
Roy v. Boston	558	Simpson v. Godmanchester	227
Ruck v. Williams	275, 472	— v. Scales	88
Ruddiman v. Smith.....	143	— v. Staffordshire Water Co. 91, 310, 315, 320, 468	
Rugby Charity v. Merryweather ... 458		Skinner v. Chapman	344
Rumsey v. Rawson	206	Slater v. Burnley Corporation	317
Russell v. Devon	635, 636	Smith v. Andrews...66, 74, 98, 103, 104, 340, 347, 348	
— v. Harford	222	— v. Archibald.....	179
— v. Shenton	632	— v. Birmingham	317
Ruther v. Harris	394	— v. Brownlow	364
Rutland v. Bowler	114	— v. Burnham Local Board 181, 489	
Rylands v. Fletcher...137, 138, 142, 144, 148		— v. Condry	424
Rypon v. Bowles	632	— v. Kemp	45, 340
		— v. Kenrick.....	140, 144, 191
		— v. London and St. Katharine Dock	334
		— v. Midland Railway	531
		— v. Milles	622
		— v. Officers of Scotland	15
		— v. Shepherd	547, 548, 550
		— v. Southwark and Vauxhall 314	
		— v. Stair (Earl of).....	18, 22
		— v. Stephen	550
		Smithett v. Blythe	575, 576, 577
		Snape v. Dobbs	280, 377
		Snow v. Whitehead	142
		Solomon v. Glover	265

S.

St. Clair v. Dysart	179
St. Helen's Chemical Works v. St. Helen's.....	178
— v. Tipping.....159, 160, 633	
St. Lawrence, Case of the Naviga- tion of the.....	78
St. Louis v. St. Louis	116, 126
Salmon v. Bensley	631

	PAGE
Somerset <i>r. Fogwell</i> ...	19, 27, 43, 74, 99, 104, 206, 337, 343, 355, 356, 370, 515
——— <i>Canal v. Harcourt</i>	91, 208, 293, 468
——— <i>Drainage Co. v. Bridgwater</i> Corporation.....	58, 181, 247
Southampton and Itchin <i>r. South-</i> <i>ampton</i>	274
——— <i>Dock v. Hill</i>	585
Southend Water Co. <i>v. Howard</i> ...	317
South Shields <i>v. Cookson</i>	215, 313
——— <i>Staffordshire Water Co. v.</i> <i>Mason</i>	313
Spencer's case	215
Spokes <i>r. Banbury</i> ...	166, 172, 178, 639, 640, 642
Stackpoole <i>v. The Queen</i>	45
Staffordshire and Derbyshire Coun-	
cils, <i>In re</i>	538
——— <i>Canal v. Birmingham</i> <i>Canal</i> ... 61, 231, 235, 258, 278, 298	
——— <i>r. Hallen</i>	304
——— <i>r. Trent and</i> <i>Mersey</i> ...	308
Stamford <i>r. Paulet</i>	581
Stanley of Alderley <i>r. Shrewsbury</i> ..	209
Staple <i>r. Haydon</i>	226
Steggles <i>r. New River Co.</i>	319
Steinson <i>v. Heath</i>	550
Stephens <i>v. Coster</i>	573
Stevens <i>r. Barnet Gas Co.</i>	317
——— <i>r. Woodward</i>	143
Stockport <i>v. Potter</i> ... 118, 124, 128, 130, 132, 133, 135, 136, 160, 162, 164, 177, 203, 254	
Stockton and Darlington Railway <i>v.</i> <i>Barrett</i> ... 277, 331, 575, 578, 584, 587	
——— <i>and Middlesboro' Water</i> <i>Board v. Kirkleatham</i> ... 313	
Stone <i>r. Yeovil</i>	312, 313, 319
Stourbridge Canal <i>r. Dudley</i> ... 197, 200, 281	
——— <i>r. Wheeley</i> ... 276, 277, 307, 308, 331, 587, 588	
Strick <i>r. Swansea Canal</i>	308, 494
Stuart <i>r. McBarnet</i>	355, 363
Stubbs <i>r. Hilditch</i>	435, 450
Sturges <i>r. Bridgman</i>	239
Success, The	2, 409
Suffield <i>r. Brown</i> 217, 219, 220, 223, 224, 225, 226	
Sulcoates Union <i>v. Hull Dock Co.</i> ...	599, 600
Sury <i>r. Pigott</i>	219, 265
Sutcliffe <i>r. Booth</i> ... 112, 131, 162, 201, 250, 252, 253, 261, 262, 264	
Sutherland <i>r. Ross</i>	394
——— <i>r. Sutherland</i>	206
Sutton <i>r. Ash</i>	142
——— <i>v. Buck</i>	44
——— <i>v. Clark</i>	274
——— <i>Harbour v. Plymouth</i> ...	600, 605

	PAGE
Sutton Pool case	444
Swansborough <i>r. Coventry</i> ... 219, 223, 227	
Swatman <i>r. Ambler</i>	555
Swindell <i>r. Birmingham Canal</i>	281
Swindon Waterworks Co. <i>v. Wilts</i> and Berks Canal ... 121, 122, 125, 126, 128, 165, 175, 633, 634, 637, 640	

T.

Talargoch Mining Co. <i>v. St. Asaph</i> ...	614
Talbot <i>r. Lewis</i>	44, 46
Tamar Navigation <i>r. Wagstaffe</i>	589
Tame <i>v. Grand Junction Canal</i>	593
Tapling <i>r. Jones</i>	243, 299
Tatton <i>r. Staffordshire Potteries</i> ...	159, 177
Taylor <i>v. Bennet</i>	176, 641
——— <i>r. St. Helen's</i> ... 58, 109, 210, 211	
——— <i>r. Waters</i>	207
——— <i>r. Windsor</i>	551
Temple Pier Co. <i>v. Metropolitan</i> <i>Board</i>	481
Tenant <i>r. Goldwin</i> ... 142, 161, 162, 200, 202, 223	
Tenham <i>r. Herbert</i>	638
Teniel <i>r. Harslop</i>	343
Thames Conservators <i>r. Smeed</i> 14, 19, 62, 478, 480, 481	
——— <i>r. S. E. Rail-</i> <i>way</i>	481
——— <i>Tunnel Co. v. Sheldon</i>	308
Thicknesse <i>r. Lancaster</i>	289, 290
Thomas <i>r. Birmingham Canal</i> ... 157, 294	
——— <i>r. Evans</i>	398
——— <i>r. Jones</i>	403
——— <i>r. Quartermaine</i>	138, 153
——— <i>r. Russell</i>	405
——— <i>r. Thomas</i>	264, 265, 267
Thompson <i>r. Burns</i>	393
——— <i>r. Gilbert</i>	632
——— <i>r. N. E. Railway Co.</i> ...	331, 333
——— <i>r. Sunderland Gas Co.</i> ... 313	
Tibbits <i>r. Yorke</i>	308
Tibble <i>r. Beadon</i>	485
Tickle <i>r. Brown</i>	232
Tighe <i>r. Sinnott</i>	351, 354
Tilbury <i>r. Silva</i> ... 49, 101, 104, 204, 230, 266, 337, 338, 367	
Tinam, <i>Ex parte</i>	493
Tinney <i>r. Fisher</i>	343
Tipping <i>r. Eckersley</i>	177, 640
Tisdell <i>r. Combe</i>	486
Todd <i>r. Flight</i>	631
Todhunter <i>r. Buckley</i>	486
Tomline, <i>In re</i>	23, 24
Tone (Conservators of) <i>v. Ash</i> ... 295, 468	
Topsell <i>r. Ferrers</i>	560
Townsend <i>v. Ash</i>	318
Trafford <i>r. The King</i>	60, 156
Trinity House <i>r. Clark</i>	575, 577
——— <i>r. Sorsbie</i>	576
——— <i>r. Staples</i> ... 562, 575, 577	

	PAGE		PAGE
Tripp v. Frank	505, 507	Warrick v. Queen's College.....	233, 364
Trotter v. Harris	501, 505	Warrington Water Co. v. Long-	
Truman v. Walgham.....	546, 547, 548, 549	shaw	317
Truro Corporation v. Rowe.....	346, 381	Warwick and Birmingham Canal v.	
Tucker v. Newman	143, 629	Birmingham	609
Turnday v. Shaw	480	Watercourse case (2 Eq. Abr.)	208
Tweed Commissioners v. Wood	383	Waterford (Mayor of), Case of the	563
Tyler v. Wilkinson	122	and Limerick Railway v.	
Tyne Commissioners v. Chirton.....	602	Kearney	537
— Keelmen v. Davidson.....	585, 586	Waterlow v. Bacon	265
— — v. Elliott.....	586	Watkins v. Gravesend.....	604
— Pontoons Co. v. Tynemouth...	604	— v. Milton	89, 604
Tyringham's case	216, 219	Watson v. Troughton	217
Tyson v. Smith	240	Watts v. Nelson...217, 221, 225, 226, 228,	263
		— v. Lucas.....	403
		Weald of Kent Canal v. Robinson	308
		Weale v. West Middlesex	316
		Wear River Commissioners v. Adam-	
		son	36, 37, 148, 151, 448, 451, 541
		Webb v. Bird	239
		— v. Paternoster	207
		Weaver v. Cardiff.....	316
		Weeks v. Howard	634, 641
		Weld v. Gaslight Co.	152
		— v. Hornby	361, 372, 643
		Weller v. Smeaton	640
		Wells v. Kingston-on-Hull.....	330
		Westbury v. Powell.....	239
		West Cumberland Iron Co. v. Ken-	
		yon	144
		— Middlesex Water Co. v. Cole-	
		man	317
		— — v. Sner-	
		krop	316
		— Norfolk Farmers Club v. Arch-	
		dale	33
		— Surrey Water Co. v. Chertsey	324
		Weymouth (Mayor of) v. Nugent...	575
		Whaley v. Laing	118, 128, 134, 136,
		162, 164, 202, 203, 250	
		Whalley v. Lancashire and York-	
		shire Railway.....	158, 295
		Wheeldon v. Burrows	217, 222
		Whelan v. Hewson	346
		White v. Bass	219, 224, 225, 326
		— v. Feast	406
		— v. Phillips	448, 450, 451
		Whitehead v. Parks	213, 214
		Whitehouse v. Birmingham.....	152, 291
		— v. Fellowes	232, 469
		Whither v. Purchase	73, 101
		Whiting v. East London Water Co.	317
		Wickford v. Bill	623
		Wickham v. Hawker	337, 339
		Wiggin v. Braithwaite	44
		Wiggins v. Boddington.....	530, 634
		Wightly Canal v. Badley	281
		Wilkes v. Hungerford.....	94
		— v. Kirby	54, 556
		Williams' case	447
		Williams v. Bedminster	620
		— v. Blackwall	391, 399
		— v. Gutch	424
		— v. Jersey	208

U.

Umfreville v. Johnson.....	631
United Alkali Co. v. Simpson ...	53, 488
Upton v. Dawkins.....	341, 643
Utopia, The	451, 453

V.

Vallego v. Wheeler	575, 577
Vance v. Frost	403
Vera Cruz, The.....	3
Vernon v. Prior	87
Vice v. Thomas.....	254
Vigilantia, The.....	2, 409
Vinkensterne v. Ebden...47, 54, 55, 555,	564, 574, 581
Vivian v. Mersey Docks	453
Vooght v. Winch	68, 82, 430, 434
Vrow Anna Catherina, The.....	2, 409
Vyner v. Mersey Docks	19

W.

Wakeman v. West	210
Walker v. Goe	305
— v. Jackson	514
— v. Lambeth Waterworks ...	316
Waller v. Manchester	315
Wallis v. Harrison	207
Ward v. Cresswell	43, 345, 361
— v. Folkestone Water Co.	318
— v. Gray	529
— v. Lee	274, 472
— v. Robbins	122, 242, 623
— v. Ward	266
— v. Wolverhampton	320
Wardle v. Brocklehurst ...210, 221, 228	
Ware v. Grand Junction Water Co.	310
Warrand v. Mackintosh	354
Warren v. Matthews ...43, 98, 345, 346,	360
— v. Prideaux...54, 546, 547, 549,	550, 559

INDEX TO CASES CITED.

XXV

	PAGE
Williams v. Jones.....	607
—— v. Long.....	398
—— v. Morland	113, 115, 125, 633
—— v. Swansea Harbour	332
—— v. Wilcox.....	65, 82, 104, 360, 371, 432, 446, 458, 461
Willoughby v. Horridge.....	513
Wilson v. Carter	453
—— v. Peto	631
—— v. Robertson	579
—— v. Townend	637
—— v. Townsend	629
—— v. Waddell	186, 141, 148
Winch v. Conservators of the Thames	88, 92, 303, 470, 471
Wingate v. Waite	38
Winter v. Brockwell.....	207, 210
Winterbotham v. Derby	626, 634
Wishart v. Wyllie	81, 100, 362, 364
Witherley v. Regent's Canal	292
Withers v. North Kent Railway ...	150
Womersley v. Church	136, 161, 162, 176, 201, 202
Wood v. Leadbitter	207, 208
—— v. Luke	207
—— v. Manley	207
—— v. Sutcliffe.....	165, 166, 177, 243, 637, 639
—— v. Venton	387
—— v. Waud ...	60, 112, 134, 159, 162, 177, 189, 203, 243, 249, 251, 260, 264, 632
Woodrup Sims, The.....	422
Woodyer v. Haddon	233
Worcester v. Droitwich	618
Worthington v. Gimson	217

	PAGE
Wright v. Brewster	581
—— v. Howard.....	113, 115, 121
—— v. Williams ...	177, 231, 233, 243, 254
Wyat Wild's case.....	216
Wyatt v. Thompson	435, 573
Wyrley and Essington Canal v. Bradley	281, 285
Wyse v. Leahy.....	345

Y.

Yard v. Ford.....	625
Yarmouth (Mayor of) v. Eaton....	54, 55, 548, 560
York Corporation v. Pilkington.....	638
Yorkshire (West Riding) v. The King	536
—— Council	
—— v. Holmfirth	184, 187
Young v. Bankier Distillery Co. ...	144, 165, 177, 189, 640
—— v. Cuthbertson.....	458
—— v. Hitchens	344, 346
—— v. Southwark and Vauxhall Water Co.	328

Z.

Zangers v. Whiskeard.....	87
Zetland (Earl of) v. Glover Incor- poration	102, 351, 363
Zollverein, The.....	424

INDEX TO THE PUBLIC STATUTES CITED.

	PAGE
Magna Charta (9 Hen. III., 20 Hen. III., 25 Edw. I.)	18, 43, 461, 516, 543, 548
3 Edw. I. c. 4 (Stat. of West. 1st) c. 31	44 ... 548
12 Edw. I. c. 7	461, n. (4)
13 Edw. I. c. 47 (Stat. of West. 2nd)	461
5 Edw. III. c. 14	595, n. (1)
25 Edw. III. Stat. 4, c. 4 (Weirs)	360, 446
45 Edw. III. c. 2 (Weirs)	360
46 Edw. III. c. 15	44, n. (14)
7 Rich. II. c. 5 (Poor Law)	595, n. (1)
12 Rich. II. c. 7 (")	595, n. (1)
13 Rich. II. c. 19 (Salmon)	461
15 Rich. II. c. 3 (Admiralty Courts)	3, 461, n. (1)
c. 6	595, n. (1)
17 Rich. II. c. 9 (Weirs and Fish)	371, 461, n. (1), 465
1 Hen. IV. c. 12 (Weirs and Fish)	360, 460, 461, n. (4)
c. 16	45, n. (1)
4 Hen. IV. c. 11 (Fish)	361
1 Hen. V. c. 2 (Weirs)	465, n. (3)
2 Hen. VI. c. 19 (Fish)	361
3 Hen. VI. c. 5	465, n. (3)
6 Hen. VI. c. 5 (Sewers)	32, 462
8 Edw. IV. c. 5 (Nuisance)	623, n. (3)
9 Edw. IV. c. 35 (")	623, n. (3)
12 Edw. IV. c. 7 (Sewers)	360, n. (1), 361, 371
11 Hen. VII. c. 2 (Poor Law)	595, n. (1)
19 Hen. VII. c. 12 (")	595, n. (1)
c. 18 (Sewers)	465, n. (1)
22 Hen. VIII. c. 5 (Bridges)	516, 517, 526, 544
c. 12 (Poor Law)	595, n. (1)
23 Hen. VIII. c. 5 (Sewers)	32, 36, 38, 462, 465
c. 8 (Harbours)	152
c. 12 (Sewers)	465, n. (3)
27 Hen. VIII. c. 23 (Harbours)	52
c. 25 (Poor Law)	595, n. (1)
3 & 4 Edw. VI. c. 16 (Poor Law)	595, n. (1)
2 & 3 Phil. & Mary c. 5 (")	595, n. (1)
1 Eliz. c. 17 (Fish)	460
5 Eliz. c. 3 (Poor Law)	595, n. (1)
13 Eliz. c. 9 (Sewers)	32, n. (2), 462, n. (6)
18 Eliz. c. 3 (Poor Law)	595, n. (1)
39 Eliz. c. 3 { " }	595, n. (1)
43 Eliz. c. 2 { " }	595, n. (1), 601, 606, 614

	PAGE
7 Jac. I. c. 18 (Foreshore)	49
3 Car. I. c. 4 (Poor Law)	595, n. (1)
16 & 17 Car. II. c. 12 (Avon (Hants) Navigation)	467, n. (1), 474, n. (3)
22 Car. II. c. 11 (Wharfage)	573, n. (1)
c. 12 (Bridges)	517, n. (1)
1 Anne, st. 1, c. 7 (Crown Lands)	19, n. (4)
c. 12 (Bridges)	517, n. (2)
6 Geo. I. c. 20 (Fisheries Grant, Scotland)	378, n. (1)
13 Geo. I. c. 26 (Fisheries Grant, Scotland)	378, n. (1)
c. 30 (Fisheries Grant, Scotland)	378, n. (1)
9 Geo. II. c. 33 (Lobsters, Scotland)	378, n. (1)
12 Geo. II. c. 29 (Bridges)	517, n. (2)
14 Geo. II. c. 33 (Bridges)	517, n. (2)
24 Geo. II. c. 8 (Upper Thames)	484, n. (1)
29 Geo. II. c. 23 (Fishery, Scotland)	378, n. (1)
11 Geo. III. c. 45 (")	484, n. (1)
c. 31 (Herrings, Scotland)	378, n. (1)
13 Geo. III. c. 78 (Bridges)	517, n. (2)
15 Geo. III. c. 11 (Upper Thames)	484, n. (1)
24 Geo. III. c. 8 { " }	484, n. (1)
28 Geo. III. c. 51 { " }	484, n. (1)
35 Geo. III. c. 106 { " }	484, n. (1)
41 Geo. III. c. 23 (Poor Rate)	611, n. (3)
43 Geo. III. c. 59 (Bridges)	517, n. (2), 533, 534, 535, 635
c. 132 (Warehousing)	573
48 Geo. III. c. 47 (Herrings, Scotland)	378, n. (1), 384, n. (2)
51 Geo. III. c. 101 (Herrings)	384, n. (2)
52 Geo. III. c. 47 (Upper Thames)	484, n. (2)
c. 110 (Bridges)	517, n. (2)
c. 153 (Herrings)	384, n. (2)
54 Geo. III. c. 59 (Harbours)	19
c. 90 (Bridges)	517, n. (2)
c. 102 (Herrings)	384, n. (2)
c. 159 (Navigation)	488
c. 170 (Bridges)	542, n. (4)
55 Geo. III. c. 94 (Herrings, Scotland)	378, n. (1), 384, n. (2)
c. 143 (Bridges)	517, n. (2)
59 Geo. III. c. 38 (Sea Fishery)	379
1 Geo. IV. c. 103 (Herrings)	384, n. (2)
3 Geo. IV. c. 126 (Turnpikes)	592
5 Geo. IV. c. 64 (Herrings)	378, n. (1), 384, n. (2)
c. 83 (Police)	492

xxviii INDEX TO THE PUBLIC STATUTES CITED.

	PAGE
6 Geo. IV. c. 125 (Pilotage)...	428, n. (1)
7 Geo. IV. c. 34 (Herrings)...	384, n. (2)
9 Geo. IV. c. 39 (Salmon, Scotland)	378, n. (1)
10 Geo. IV. c. 98 (Rating).....	607, n. (3)
11 Geo. IV. & 1 Will. IV. c. 54 (Herrings).....	378, n. (1), 384, n. (2)
1 & 2 Will. IV. c. 32 (Game)	363
c. 33 (Improvement of Land, Ireland).....	378, n. (1), 463, n. (2)
2 & 3 Will. IV. c. 71 (Prescription Act)...	231, 235, 259, 260, 300, 301, 339, 551
3 & 4 Will. IV. c. 22 (Sewers).....	33, 38, 462, n. (6)
c. 52 (Customs).....	45
c. 90 (Lighting and Watching)	598
4 & 5 Will. IV. c. 36 (Central Criminal Court)	3, 409
5 & 6 Will. IV. c. 11 (Bridges)	635
c. 50 (Highways and Bridges)	517, 518, 520, 526
c. 76 (Municipal Corporations)	537
6 & 7 Will. IV. c. 13 (Constabulary, Ireland)	378, n. (1)
1 & 2 Vict. c. 56 (Rating, Ireland)	378, n. (1)
2 & 3 Vict. c. 47 (Metropolitan Police)	143
c. 61 (River Shannon) ...	474, n. (1)
3 & 4 Vict. c. 50 (Police).....	493
c. 65 (Admiralty Court)	409
c. 88 (Constables).....	386
4 & 5 Vict. c. 57 (Pilchard Fishery)	396, n. (6)
5 & 6 Vict. c. 89 (Improvement of Land, Ireland)	463, n. (2)
c. 89 (Drainage, Ireland)	378, n. (1)
c. 106 (Fishery, Ireland)	378, n. (1), 399, n. (4)
6 & 7 Vict. c. 79 (Herrings)	379, 384, n. (1)
c. 94 (Defence Act)	9, n. (3)
7 & 8 Vict. c. 61 (County Bridges)...	538
c. 95 (Salmon, Scotland)	378, n. (1)
c. 108 (Fishery, Ireland).....	378, n. (1)
8 & 9 Vict. c. 16 (Companies Clauses Act).....	310, 312, 494
c. 17 (Companies Clauses Act)	312, 494
c. 18 (Lands Clauses Act).....	52, n. (1), 309, 311, 312, 319, n. (1), 322, 323, n. (2), 503, n. (3), 509
c. 20 (Railway Clauses Act)	52, n. (1), 503, 509, 531, 537
c. 26 (Trout, Scotland) ...	378, n. (1)
c. 28 (Canal Tolls) ...	308, n. (3), 493, 494, n. (3)
c. 42 (Canal Traffic).....	308, n. (3), 493
c. 99 (Foreshore)	18
c. 108 (Oyster, Salmon and Trout, Ireland).....	378, n. (1)
c. 118 (Enclosure)	463, n. (2)
9 & 10 Vict. c. 3 (Fisheries and Harbours, Ireland).....	378, n. (1)
c. 86 (Public Works, Ireland)	378, n. (1)

	PAGE
9 & 10 Vict. c. 93 (Death—Representatives)	291, 307
10 & 11 Vict. c. 15 (Gasworks Clauses)	180
c. 17 (Waterworks Clauses).....	177, 309, 310, 311, 314, n. (1), 317, 318, 319, n. (1), 322, 324
c. 27 (Harbours, Docks, and Piers)	52, 329, 411, 452, 580
c. 34 (Towns Clauses Act)	182, n. (2)
c. 38 (Drainage)	463, n. (2)
c. 91 (Herrings)	584, n. (2)
c. 92 (Mussels, Scotland).....	378, n. (1)
c. 94 (Canal Traffic)	308, 494
11 & 12 Vict. c. 63 (Public Health)	322, 462, 463, n. (1)
c. 92 (Salmon and Trout, Ireland)	378, n. (1)
c. 112 (Public Health) ...	463, n. (1)
12 & 13 Vict. c. 93 (Drainage)	463, n. (1)
c. 45 (Procedure)	617
c. 100 "	463, n. (2)
13 & 14 Vict. c. 88 (Oyster, Salmon, and Trout, Ireland).....	378, n. (1)
14 & 15 Vict. c. 26 (Herrings)	384
c. 34 (Lodging Houses)	325
15 & 16 Vict. c. 76 (Common Law Procedure).....	622
c. 84 (Metropolis Water).....	326
16 & 17 Vict. c. 107 (Customs)	51
17 & 18 Vict. c. 31 (Railway and Canal Traffic)	308, n. (3), 494
c. 104 (Merchant Shipping).....	45, 411, n. (9)
18 & 19 Vict. c. 90 (Crown Suits) ...	642
c. 116 (Public Health) ...	463, n. (1)
c. 120 (").....	172, 450,
463, n. (1), 481, n. (1)	
c. 121 (Nuisance Removal).....	15
19 & 20 Vict. c. 9 (Drainage, Ireland)	463, n. (2)
20 & 21 Vict. c. 43 (Justice of Peace)	403
c. 113 (Upper Thames)	484
21 & 22 Vict. c. 75 (Canal Traffic)	493, n. (5)
c. 97 (Local Government)	463, n. (1), 641
c. 98 (")	322, 463, n. (1)
c. 104 (")	463, n. (1), 481, n. (2), 482, n. (2)
c. 109 (Cornwall Duchy)	101
c. 147 (Metropolis Main Drainage)	482, n. (2)
23 & 24 Vict. c. 77 (Public Health)	182, n. (2)
c. 106 (Lands Clauses Act).....	312, 322
24 & 25 Vict. c. 10 (Admiralty Court)	410
c. 45 (Harbours)	52, 411
c. 47 (Passing Tolls Act).....	53, 411
c. 61 (Local Government).....	172, 323, 641
c. 62 (Crown Suits)	642
c. 70 (Locomotives Act) ...	529
c. 96 (Larceny Act)	329, n. (7), 377, 405

	PAGE
24 & 25 Vict. c. 97 (Malicious Injuries) ... 182, 329, n. (7), 397, n. (8), 406, 489, 519	
c. 109 (Salmon Fisheries)...181, 352, 377, 385-391, 393-404	
c. 133 (Land Drainage) 32, 463, n. (2)	
25 & 26 Vict. c. 69 (Harbours)... 52, 411	
c. 79 (Salmon, Scotland)...378, n. (1)	
c. 93 (Thames Embankment) 482, n. (2)	
c. 102 (Public Health) 172, 463, n. (1)	
26 & 27 Vict. c. 10 (Exportation of Salmon) 377, 378, n. (1)	
c. 92 (Railways Clauses Act)...489-492, 495	
c. 93 (Waterworks Clauses Act) 311, 322, 324	
c. 114 (Salmon and Trout, Ireland).....378, n. (1)	
c. 118 (Companies Clauses Act) 312	
27 & 28 Vict. c. 3 (Mutiny Act)..... 529	
c. 33 (Fish Teinds, Scotland) 378, n. (1)	
c. 48 (Salmon, Scotland)...378, n. (1)	
c. 113 (Thames Conservancy) 479, n. (1)	
c. 114 (Improvement of Land) 325, 463	
28 & 29 Vict. c. 75 (Sewage)...182, n. (2), 463, n. (1)	
c. 104 (Crown Suits) 642	
c. 106 (Dock Construction Loan) 329, n. (7)	
c. 121 (Salmon Fishing)...377, 385-391, 393, 397-404	
c. 125 (Dockyards Regulation) 53	
29 & 30 Vict. c. 62 (Foreshore) 18	
c. 88 (Oysters, Ireland)... 378, n. (1)	
c. 89 (Thames Navigation)...471, 484	
c. 90 (Public Health).....323, n. (1)	
c. 97 (Oysters, Ireland)...378, n. (1)	
30 & 31 Vict. c. 52 (Herrings, Scotland).....378, n. (1)	
c. 101 (Public Health, Scotland) 178, n. (1)	
c. 113 (Sewage) 463, n. (1)	
c. 142 (County Courts) 627	
31 & 32 Vict. c. 40 (Thames Embankment) 481, n. (2)	
c. 45 (Sea Fisheries)...12, 344, n. (4), 379, 380, 391, n. (2), 392, 397	
c. 122 (Poor Law)..... 15, 76, 596	
c. 123 (Salmon, Scotland) 378, n. (1)	
32 & 33 Vict. c. 18 (Lands Clauses Act) 312	
c. 48 (Companies Clauses Act) 312	
c. 67 (Valuation) 616	
c. 92 (Fishery, Ireland)... 378, n. (1)	
33 & 34 Vict. c. 33 (Salmon, Scotland).....378, n. (1)	
c. 70 (Gas and Water)..... 321	
c. 73 (Bridges).....520, 534, n. (1)	
c. 75 (Education) 499	
34 & 35 Vict. c. 17 (Bank Holidays) 329, n. (7)	

	PAGE
34 & 35 Vict. c. 70 (Local Government) 463, n. (1)	
c. 113 (Metropolis Water) ... 326	
35 & 36 Vict. c. 79 (Public Health) 463, n. (1)	
c. 91 (Municipal Corporations, Borough Funds) 325	
36 & 37 Vict. c. 48 (Canal Traffic) 308, n. (3), 495	
c. 66 (Judicature Act)... 423, n. (1), 622, 626, n. (5)	
c. 71 (Fisheries)...182, 377, 385-390, 394-400	
c. 86 (Education) 499	
c. 89 (Gas and Water) 322	
37 & 38 Vict. c. 40 (Arbitration) 308, n. (3), 495	
c. 54 (Poor Law) 607	
c. 60 (River Shannon) ... 474, n. (3)	
c. 86 (Fishery Advances, Ireland).....378, n. (1)	
c. 89 (Public Health) ... 182, n. (2), 323, n. (1)	
c. 94 (Foreshore) 28	
38 & 39 Vict. c. 13 (Bank Holiday) 329, n. (7)	
c. 17 (Explosives Act)..... 498	
c. 31 (Public Works)..... 463, n. (1)	
c. 55 (Public Health) 180, 323, 463, n. (1), 520, 635	
c. 77 (Judicature Act)..... 622, 626, n. (5), 630	
c. 86 (Conspiracy) 325	
c. 89 (Public Works Loans Act) 53, 411	
39 & 40 Vict. c. 19 (Salmon Fisheries) 377, 387-390, 395	
c. 31 (Public Works Loans Act) 463, n. (1)	
c. 34 (Elvers and Severn Fishery) 379, n. (1)	
c. 36 (Customs Consolidation)... 51	
c. — (Bank Holiday)..... 329, n. (7)	
c. 75 (Rivers Pollution Prevention Act) 182-188	
c. 79 (Education) 499	
40 & 41 Vict. c. 13 (Customs Consolidation) 52	
c. 14 (Bridges) 520	
c. 31 (Drainage) 325	
c. 42 (Oyster, Crab, and Lobster) 380, 384, 393	
c. 60 (Canal Boats) 498	
c. 65 (Fisheries Dynamite Act) 397, 404	
c. 98 (Norfolk & Suffolk Fishery) 377	
41 & 42 Vict. c. 15 (Customs Consolidation) 52	
c. 39 (Freshwater Fisheries) ... 373, 389, 390, 395-397	
c. 45 (Public Health, Water)... 325	
c. 46 (Appeals, Ireland)...378, n. (1)	
c. 59 (Public Health, Ireland) 178, n. (4)	
c. 73 (Territorial Waters)...8, 12, 409	
c. 77 (Bridges) 520	

	PAGE		PAGE
41 & 42 Vict. c. 78 (Employment of Children, Scotland)...	378, n. (1)	53 & 54 Vict. c. 59 (Public Health) 178, 180	
42 & 43 Vict. c. 26 (Salmon Fishery) 377, 393		54 & 55 Vict. c. 28 (Herrings, Scotland).....	378, n. (1)
c. 49 (Summary Jurisdiction)...	391	c. 37 (Sea Fishery).....	12, 380, 381, 383, 384, 390
44 & 45 Vict. c. 11 (Clam and Bait Beds, Scotland)	378, n. (1)	c. 48 (Fishery Advances, Ireland).....	378, n. (1)
c. 12 (Customs Consolidation)...	52	c. 63 (Bridges)	521
c. 16 (Fishery Advances, Ireland) 378, n. (1)		c. 72 (Public Health, London) 328	
c. 33 (Summary Procedure, Scotland).....	378, n. (1)	55 & 56 Vict. c. 48 (Fishery Advances, Ireland)	378, n. (1)
c. 41 (Conveyancing and Law of Property)	206, n. (1)	c. 50 (Salmon)	391, 396
c. 49 (Rights of Fishery, Ireland) 378, n. (1)		56 & 57 Vict. c. 17 (North Sea Fishery)	380, 381
c. 66 (Pollen, Ireland) ...	378, n. (1)	c. 31 (Rivers Pollution Prevention).....	179, n. (1), 182
45 & 46 Vict. c. 72 (Customs Consolidation).....	52	c. 73 (Local Government)....	326, 520
c. 78 (Fishery Board, Scotland) 378, n. (1)		57 & 58 Vict. c. 2 (Behring Sea Award)	380
c. 88 (Settled Land).....	206, n. (1)	c. 26 (Sea Fisheries, Shell Fish Regulation).....	384, 393
46 & 47 Vict. c. 22 (Sea Fishery) 12, 380, 381		c. 60 (Merchant Shipping) ...	3, 45, 53, 380, n. (2), 499, 605
c. 55 (Customs Consolidation)...	52	58 & 59 Vict. c. 29 (Salmon, Ireland) 378, n. (1)	
47 Vict. c. 11 (Freshwater Fishery) 377, 389, 395		c. 42 (Sea Fisheries Regulation, Scotland).....	378, n. (1)
47 & 48 Vict. c. 21 (Sea Fishery, Ireland)	378, n. (1)	59 & 60 Vict. c. 12 (Derelict Vessels) 428, n. (1)	
c. 27 (Sea Fishery)	381	c. 42 (Loans, Scotland)...	378, n. (1)
c. 48 (Oysters, Ireland)...	378, n. (1)	c. 54 (Public Health, Ireland) 188, n. (2)	
c. 75 (Canal Boats)	498, 499	60 & 61 Vict. c. 21 (Mersey Channels) 428	
48 & 49 Vict. c. 61 (Secretary of State for Scotland) ...	188, n. (1), 378, n. (1)	c. 17 (Appeals, Ireland)...	378, n. (1)
c. 70 (Scottish Sea Fishery) 378, n. (1)		c. 59 (Merchant Shipping) 428, n. (1)	
49 Vict. c. 2 (Freshwater Fishery)...	378	c. 61 (Exemption from Pilotage)	428, n. (1)
49 & 50 Vict. c. 29 (Crofting Parishes, Scotland).....	378, n. (1)	61 & 62 Vict. c. 14 (Liability of Shipowners).....	428, n. (1)
c. 39 (Salmon and Freshwater Fishery).....	377, 378, 385, 388	c. 16 (Canals Protection, London) 500	
50 & 51 Vict. c. 52 (Secretary of State for Scotland).....	378, n. (1)	c. 28 (Mussels, Ireland)...	378, n. (1)
51 & 52 Vict. c. 25 (Railway and Canal Traffic) ...	308, n. (3), 495-497, 553, 587	c. 34 (Rivers Pollution Prevention, Border Councils) 186, n. (1)	
c. 30 (Trawling, Ireland)...	378, n. (1)	c. 37 (Local Government, Ireland)	378, n. (1)
c. 41 (Local Government) 186, n. (1), 520, 521, 536		c. 44 (Mercantile Marine Fund) 428, n. (1)	
52 & 53 Vict. c. 33 (Herrings, Scotland).....	378, n. (1)	c. 56 (Sea Fishery Grant, Scotland).....	378, n. (1)
c. 42 (Customs Consolidation) 52		62 & 63 Vict. c. 23 (Anchor and Chain Cables).....	428, n. (1)
c. 43 (County Courts)	627, 628	c. 50 (Department of Agriculture, Ireland)	378, n. (1)
c. 50 (Local Government, Scotland).....	178, n. (4), 188, n. (1)	63 & 64 Vict. c. 32 (Liability of Shipowners).....	428, n. (1)
c. 54 (Sea Fisheries Regulation) 383		1 Edw. VII. c. 38 (Steam Trawling, Ireland)	378, n. (1)
53 & 54 Vict. c. 10 (Herrings, Scotland).....	378, n. (1)		
c. 36 (Customs Consolidation)...	52		

LOCAL ACTS OF PUBLIC IMPORTANCE CITED.

22 & 23 Vict. c. cxxxiii. (Watermen and Lightermen)	485-487	57 & 58 Vict. c. clxvi. (West Riding of Yorkshire Rivers) ...	186, n. (1)
55 & 56 Vict. c. xcxi. (Mersey and Irwell Joint Committee Act) 186, n. (1)		57 & 58 Vict. c. clxxxvii. (Thames Conservancy).....	477-483, 458

ERRATA.

- Page 12. For "56 & 57 Vict. c. 53" read "56 & 57 Vict. c. 17."
,, 18, note (2). For "*R. v. Clark*, 12 Moo. 615" read "12 Mod. 615."
,, 42, note (1). For "*South Eastern Railway Co. v. Dorling*" read "*Eastern Counties Railway v. Dorling*."
,, 82, note (10). For "*Reg. v. Montague*" read "*Re x v. Montague*."
,, 92, note (2). For "*Manby v. St. Helens*" read "*Manley v. St. Helens*."
,, 158, note (2). For "*Queen v. Pagham*" read "*Re x v. Pagham*."
,, 164, note (1). For "3 H. & C. 901" read "3 H. & N. 901."
,, 166, note (1). For "*Spiker v. Banbury*" read "*Spokes v. Banbury*."
,, 178, note (1). For "*R. v. Darlington*" read "*Reg. v. Darlington*."
,, 391, note (2). For "*R. v. Henley*" read "*Reg. v. Henley*."
,, 411, line 2 from end of page. For "40 & 41 Vict. c. 16, s. 4," read "57 & 58 Vict. c. 60, ss. 530-534."
,, 411, note (9). For "An Act," etc., read "Repealing 40 & 41 Vict. c. 16, an Act," etc.
,, 412, line 4 from top of page. For "sect. 5" read "sect. 531 (1)"; and on line 7 from top of page, for "sect. 7" read "sect. 533."
,, 464, note (3). Insert "*R. v. Bristol Dock Co.*" before "6 B. & C. 181."
,, 466, note (2). For "*Yeaw v. Holland*" read "*Jean v. Holland*."
,, 522, note (5). For "*R. v. Southampton*" read "*Reg. v. Southampton*."
,, 570, note (3). For "*Brine v. Thompson*" read "*Brune v. Thompson*."
,, 598, note (3). At end, for "34 L. T. 159" read "54 L. T. 159."
,, 620, note (2). For "*R. v. St. George the Martyr*" read "*Reg. v. St. George the Martyr*."
,, 636, note (3). For "*R. v. Adderbury East*" read "*Reg. v. Adderbury East*, 1 Dav. & M. 324."

THE LAW RELATING TO WATERS.

CHAPTER I.

OF THE SEA, AND RIGHTS THEREIN.

The High Seas.

THE high seas include the whole of the seas below low water mark and outside the body of a county.¹ Definition.

The realm of England only extends to low water mark, and all beyond is the high seas.²

The reason of the thing, the preponderance of authority, and the practice of nations, have decided that the main ocean, inasmuch as it is the necessary highway of all nations, and is from its nature incapable of being continuously possessed, cannot be the property of any one State. It is possible, however, that a nation may acquire exclusive right of navigation and fishing of the main ocean *as against another nation*, by virtue of the specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights; and there have been instances of such renunciations both in ancient and modern times.³ It would appear also that a nation may give a tacit consent to the Property in bed.

¹ As to this see *Reg. v. Keyn*, 2 Ex. Div. 63, 46 L. J., M.C. 17, see *post*; see also *Leigh v. Burley*, Ow. 122, per Lord Coke, C. J.

² It seems certainly to have been the general opinion of writers on international law that the territory of a State extends to the distance of three miles or more, or the distance of a cannon shot, seaward from low water mark; but the case of *Reg. v. Keyn*, 2 Ex. Div. 63, which will be noticed later, establishes the proposition stated in the text, Cockburn, C. J., remarking that writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be

bound by it. This assent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage; p. 201. Cf. per Lord Kenyon in *Ball v. Herbert*, 3 T. R. 253, 1 R. R. 695, cited in *Blundell v. Cuttrel*, 5 B. & A. 268, 24 R. R. 353. See also as to this, Selden, *Mare Claus.*, bk. 2; Hale de Jure Maris, Harg. Tr. p. 10; Grotius de Jure Belli, lib. ii. c. 2, s. 13; Bynkershoek de Dom. Mar.; Vattel, *Droit des Gens*, s. 288; Hautefeuille, *Droit Maritime*, p. 197; Ortolan, *Diplomatie de la Mer*, liv. 2, c. 8; Wheaton's *International Law*, by Boyd, p. 237; Phillimore's *International Law*, vol. 1, cc. vi. and vii.

³ Phillimore's *International Law*, vol. 1, pp. 210, 211.

appropriation of certain portions of the sea for fishing and navigation by *non user*.¹

The free navigation, commerce, and fishery in the high seas is therefore the common right of all mankind;² and as a physical necessity, the soil of the bed of the sea can be the exclusive property of no one individual or nation, except in those rare cases where a portion of the bed of the sea has been beneficially occupied for a sufficient time by any one nation to give a prescriptive right to that portion, by the acquiescence of the other nations. The writers on international law have questioned how far that particular species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it is called, the uninterrupted possession of territory or other property for a certain length of time by a State excludes the claim of every other.³ It would also appear, that when the sea or the bed on which it rests can be physically occupied permanently—as by the erection of piers, harbours, breakwaters or forts—it may be the subject of occupation, the same as unoccupied territory, independently of prescription. In point of fact, such encroachments are generally made for the benefit of the navigation, and are therefore readily acquiesced in. But whether, if an encroachment in the sea were such as to obstruct the navigation to the ships of other nations, it would not amount to just cause for complaint as inconsistent with international rights, might, if the case arose, be deserving of serious consideration.⁴

Navigation

The high seas, as has been said, are open to all the world, and the ships of every nation are free to navigate them. The ships of all nations while so navigating the high seas are only subject to the laws of their own country; and no one nation has the right to exercise civil or criminal jurisdiction over the ships of other nations while passing over the high seas between one foreign port and another.⁵

The English Court of the Admiralty has from the earliest times exercised criminal jurisdiction over English ships on the high

¹ Vattel, *Droit des Gens*, t. 1, c. xxiii.

² Wheaton's *International Law*, by Boyd, p. 251.

³ *Ibid.* p. 220.

⁴ Cockburn, C. J., *Reg. v. Keyn*, 2 Ex. Div. p. 198.

⁵ *Reg. v. Keyn*, 2 Ex. Div., per Kelly, C. B., p. 217; *The Vigilantia*, 1 C. Rob. 1; *The Vrow Anna Catherina*, 5 C. Rob. 161; *The Surcouf*, 1 Dodds, Ad. 131. As to "*Navigation*" see *post*, Chap. VII.

seas all over the world.¹ By *stat. 15 Ric. II. c. 3*, it was enacted that the admiral should have no jurisdiction within the body of counties either by land or sea, except for mayhem and murder done in great ships being and hovering in estuaries and mouths of great rivers below the bridges, where he should have a concurrent jurisdiction with the Courts of common law. Upon this footing the criminal law has remained ever since, the jurisdiction of the admiral having been transferred to the Central Criminal Court by *4 & 5 Will. IV. c. 36*.

Although the laws of trade and navigation cannot affect foreigners beyond the territorial jurisdiction of a State so as to render them criminally liable to those laws, the English legislature has asserted a certain dominion over foreign ships by sect. 688 of the *Merchant Shipping Act, 1894*, *57 & 58 Vict. c. 60*. This section provides that—

“(1) Whenever any injury has in any part of the world been caused to any property² belonging to her Majesty or any of her Majesty’s subjects by a foreign ship, and at any time thereafter that ship is found in any port or river of the United Kingdom, or within three miles of the coast thereof, a judge of record in the United Kingdom (and in Scotland the Court of Session and also the sheriff of the county within whose jurisdiction the ship may be) may, upon its being shown to him by any person applying summarily that the injury was probably caused by misconduct or want of skill of the master or mariners of the ship, issue an order directed to any officer of customs or other officer named by the judge, Court, or sheriff, requiring him to detain the ship until such time as the owner, master or consignee thereof has made satisfaction in respect of the injury, or has given security, to be approved by the judge, Court, or sheriff, to abide the event of any action, suit or other legal proceeding that may be instituted in respect of the injury, and to pay all costs and damages that may be awarded thereon; and any officer of customs or other officer to whom the order is directed shall detain the ship accordingly.

Merchant
Shipping Act,
1894, s. 688.

Power to
arrest foreign
ship that has
occasioned
damage.

¹ Foreigners on board English ships are subject to English law. See *Reg. v. Sattler*, Dears. & B., Cr. C. 525; *Reg. v. Anderson*, L. R., 1 Cr. C. 161. 19 L. T. 400; *Reg. v. Lesley*, Bell, Cr. C. 220.

² The remedy given by the similar section of the Act of 1854 is confined to cases of damage to property and does not ex-

tend to injury to the person. (*Harris v. Owners of the Franconia*, 2 C. P. D. 173; *The Vera Cruz*, 10 App. Cas. 59.) In *The Bilbao*, Lush. 149, this provision was held to give jurisdiction in a case of damage by a foreign ship within the body of a county.

"(2) Where it appears that before an application can be made under this section, the ship in respect of which the application is to be made will have departed from the limits of the United Kingdom or three miles from the coast thereof, the ship may be detained for such time as will allow the application to be made, and the result thereof to be communicated to the officer detaining the ship; and that officer shall not be liable for any costs or damages in respect of the detention unless the same is proved to have been made without reasonable grounds.

"(3) In any legal proceeding in relation to any such injury aforesaid, the person giving security shall be made defendant or defender, and shall be stated to be the owner of the ship that has occasioned the damage; and the production of the order of the judge, Court, or sheriff made in relation to the security shall be conclusive evidence of the liability of the defendant or defender to the proceedings."¹

Cockburn, C. J., doubts whether a similar section in the Act of 1864 would apply to a ship on a foreign voyage, as the authority is to *detain* and not to *seize*, and would seem applicable only to a vessel voluntarily seeking our waters otherwise than for the purpose of passage, and so bringing itself within our jurisdiction.²

Pirates.

Pirates, being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, may be lawfully captured on the high sea by the armed vessels of any particular State, and brought within its territorial jurisdiction for trial at its tribunals.³

Tolls.

The sea, being the great highway of the world, no tolls are demandable for vessels navigating it. This freedom is, however, subject to exceptions arising from benefits done to the community at large which form a just consideration for a toll—such as the formation of ports, harbours, and the like—and the maintenance of lights, buoys and beacons.⁴ "If," says Hale, C. J., "any man will prescribe for a toll upon the sea, he must allege good consideration; because, by Magna Charta and other statutes, every man has a right to go and come upon the sea without impediment."⁵ An Act of Parliament will, of course, be

¹ As to offences against property or person committed abroad or on the high seas by masters, seamen or apprentices belonging to British ships see sects. 689—691. See also Abbot's Law of Merchant Shipping (14th ed.), by J. P. Aspinall, K. C., and H. S. Moore, p. 1270.

² *Reg. v. Keyn*, 2 Ex. Div. p. 218.

³ Wheaton's International Law, p. 168.

⁴ Hale de Jure Maris, Harg. Tr. 51; *Gann v. Free Fishers of Whitstable*, 11 H. L. 193.

⁵ 1 Mcd. 105.

effectual to enforce a toll anywhere within its operation.¹ The right of navigation includes the right of anchoring; and no tolls can be taken for anchorage unless in a port or harbour.²

There is no limit imposed by the common law or by international law, either as to the description of fish that may be caught on the high seas, or the means of catching them, or the season during which they may be caught. But it would appear that a nation may bind itself by treaty, or, perhaps, even by *non user*, from participating in this common right at certain places in favour of other nations.³ Where this right is exercised by several nations, the customs of other nations must be respected, even in places which are free to all the world.⁴

Fishery.

Although, as has been stated, the realm of England only extends to low water mark, and all beyond is high seas, yet the common consent of civilized independent States, which constitutes international law, has undoubtedly appropriated a certain portion of the high seas washing the shore of each State to that State for the fuller enjoyment and protection of its rights.⁵ The distance to which these so-called territorial waters extend appears generally to be fixed at three nautical miles; but this distance is not absolute, and is liable to be altered by the provisions of particular treaties.⁶ The extravagant doctrine laid down by *Selden* in his *Mare clausum*, and followed by *Hale de Jure Maris*, that the four seas washing the coasts of England were in the absolute dominion and ownership of the sovereign of England, has long ago given way to the influence of reason and common sense; but it was up to the decision of the recent case, *Reg. v. Keyn*, a *rexata quæstio*, giving rise to much difference of opinion, whether the dominion which is admitted to exist by the sovereign

Territorial waters. Jurisdiction of the Crown.

¹ Woolrych on Waters, p. 299.

² *Gunn v. Free Fishers of Whitstable*, *supra*. As to tolls, see further p. 53, *post*, and Chap. IX.

³ Phillimore's International Law, vol. 1, p. 213; Vattel, t. 1, l. 1, c. xxiii., sect. 286.

⁴ *Fennings and others v. Lord Grenville*, 1 Taunt. 248, 9 R. R. 760. As to "*Fishery*," see *post*, Chap. VI.

⁵ As regards the territorial waters of foreign States, the following provision is inserted in the King's Regulations and Admiralty Instructions for their due recognition by naval officers and men:—

"The territorial limits of foreign

"Powers in amity with his Majesty are to be scrupulously respected. No exercise of authority over the persons, the ships, or the goods of another nation is permissible within such limits, nor is great gun practice to take place whether at floating targets or objects on shore within such limits without the permission of the authorities." (Sect. 455.)

⁶ Phillimore's International Law, vol. 1, p. 237. The limit agreed on by Great Britain, France and the United States is three nautical miles, Spain puts it at six miles, and Germany at cannon range. See as to this point the *Encyclopædia of the Laws of England* (Renton), pp. 132—134, "Territorial Waters."

of England over such territorial waters is an absolute dominion, so as to constitute such territorial waters part of the realm of England, and vest the property of the soil below the water in the Crown, or whether it is a more limited dominion dependent not on original or inherent right, but on the acquiescence of other nations, and so limited by such acquiescence to the particular purposes for which such dominion has been acquiesced in.

Reg. v. Keyn. In the case of *Reg. v. Keyn*,¹ the defendant, a foreigner, commanding a foreign ship on a voyage to a foreign port, was tried and convicted of manslaughter at the Central Criminal Court for running down an English ship within three miles of the shore of England, and causing the death of a passenger under circumstances which amounted to manslaughter by English law. The learned judge at the trial, Pollock, B., reserved the question of jurisdiction for the Court for Crown Cases Reserved. The case was twice argued, the second time before fourteen judges, and the conviction was quashed by a majority of seven to six, one judge, Archibald, J., having died before the judgment was given, who would have agreed with the majority of the Court. It being admitted that the defendant being a foreigner on board a foreign ship, could not have been tried by an English Court if the crime had been committed on the high seas out of British territory, the real question in the case was whether this spot on the high seas where the collision occurred was or was not within the British territory. The minority of the Court, Lord Coleridge, C. J., Brett and Amphlett, JJ. A., Grove and Lindley, JJ., held that by the law of nations, the open sea within three miles of the coast of England is a part of the territory of the nation as much and as completely as if it were land a part of the territory of the nation, and that every enactment, whether of statute or of common law, applied to the whole of such territory, and that, therefore, the Central Criminal Court which succeeded to the criminal jurisdiction of the admiral over the seas without the body of a county, but within the territorial jurisdiction of the realm, had jurisdiction to try the case. Denman, J., agreed with the minority on the ground that the act causing death was committed on board the English ship, and so constructively on British territory. The majority of the Court, Cockburn, C. J., Kelly, C. B., Bramwell, J. A., Lush and Field, JJ., Sir R. Phillimore and Pollock, B., held that the Central Criminal Court

¹ 2 Ex. Div. 63, 46 L. J., M. C. 17.

had no jurisdiction, and quashed the conviction. The elaborate judgment of Cockburn, C. J., with which the majority of the Court substantially agreed, was to the effect, that although the common consent of nations had appropriated the sea within three miles of the shore to the adjacent State to deal with as such State might think fit and expedient for its own interests, yet such concurrent assent that a portion of what was before treated as the high seas, and, as such, common to the world, should be treated as British territory, could not of itself, without the authority of Parliament, convert that which before was in the eye of the law high sea into British territory, and so change the law or give to the Courts of this country a jurisdiction over the foreigner where they had it not before. Sir R. Phillimore seems rather to imply a doubt as to the power of Parliament to legislate for these waters, so as to bind other nations, except for the purposes of the protection and peace of the State; but Lush, J., particularly guards himself from seeming to imply any doubt as to the competency of Parliament to legislate as it may think fit for these waters; and his short judgment expresses in a few words his view of the law.¹ “I have already announced that, although I had prepared a separate judgment, I did not feel it necessary to deliver it, because, having since perused the judgment which the Lord Chief Justice has just read, I found that we agreed entirely in our conclusions, and that I agreed in the main with the reasons on which those conclusions are founded. I wish however to guard myself from being supposed to imply a doubt as to the competency of Parliament to legislate as it may think fit for these waters. I think that usage and the common consent of nations, which constitute international law, have appropriated these waters to the adjacent State, to deal with them as the State may deem expedient for its own interests. They are, therefore, in the language of diplomacy and of international law, termed by a convenient metaphor the territorial waters of Great Britain, and the same or equivalent phrases are used in some of our statutes, denoting that this belt of sea is under the exclusive dominion of the State. But the dominion is the dominion of Parliament, and not the dominion of the common law. That extends no farther than the limits of the realm. In the reign of Richard II., the realm consisted of the land within the body

¹ 2 Ex. Div. 238.

“of the counties. All beyond low water mark was part of the
 “high seas. At that period the three mile radius had not been
 “thought of. International law, which, upon this subject at
 “least, has grown up since that period, cannot enlarge the area
 “of our municipal law; nor could treaties with all the nations
 “of the world have that effect. That can only be done by
 “Parliament. As no such Act has been passed, it follows that
 “what was out of the realm then, is out of the realm now, and
 “what was part of the high seas then, is part of the high seas
 “now, and upon the high seas the Admiralty jurisdiction was
 “confined to British ships. Therefore, although as between
 “nation and nation these waters are British territory, as being
 “under the exclusive dominion of Great Britain, in judicial
 “language they are out of the realm, and any exercise of
 “criminal jurisdiction over a foreign ship in these waters must,
 “in my judgment, be authorized by an Act of Parliament.”

41 & 42 Vict.
 c. 73.

This appears to be the view taken by the legislature, for immediately after the decision of the case, an Act entitled *The Territorial Waters Act*, was passed, defining the territorial waters of her Majesty's dominions to be so much of the sea adjacent to the coast as is deemed by international law to be within the territorial waters of her Majesty, and declaring that for the purposes of the Act any part of the sea within a marine league of the coast, measured from low water mark, shall be open sea within the territorial waters of her Majesty's dominions. It then enacts, that any offence committed by a person, whether he is or is not a subject of her Majesty, within the territorial waters of her Majesty's dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who commits it may be arrested and tried and punished accordingly. It is, however, provided that “Proceedings for the trial or
 “punishment of a person not being a subject of her Majesty
 “shall not be instituted in any Court of the United Kingdom
 “except with the consent of one of her Majesty's principal
 “Secretaries of State, nor in any of the dominions out of the
 “United Kingdom except with the leave of the governor thereof.”

Title of the
 Crown to soil
 below low
 water mark as
 against other
 nations.

This statute does not enlarge or declare the law as to the ownership of the bed of the sea below low water mark, and it would appear, according to the decision of *Reg. v. Keyn*, that as no statute has been passed so appropriating it, except in the

case of an uninterrupted occupation for a sufficient time to gain a title by prescription, the Crown would have no right in the bed of the sea beyond low water mark, and within three miles as against other nations. The question as to whether the Crown is entitled to the ownership of the soil beneath the sea within three miles, has never been directly raised apart from the question of jurisdiction; and though it would appear now to be finally settled by *Reg. v. Keyn* that the Crown has no such rights below low water mark, it should be mentioned that in the case of *Gammel v. Commissioners of Woods and Forests*,¹ Lord Wensleydale, and apparently Lord Cranworth, are of opinion that the soil of the shore within three miles is in the Crown, as are also Lord Chelmsford and Erle, C. J., in *Gann v. Free Fishers of Whitstable*.²

It would seem clear that by international law the Crown has, independently of the question of ownership of the bed of the sea, or of the limits of the realm, all necessary powers of protection and self-defence over subjects and foreigners alike.³ "A nation," says Vattel,⁴ "is under an obligation to preserve itself and its members, and has a right to everything necessary for its self-preservation and which can assist it to ward off imminent danger and to keep at a distance everything capable of causing its ruin."⁵

Right of
protection.

¹ 3 McQueen, H. L. 419.

² 11 C. B., N. S. 387; 11 H. L. 192; see also judgment of Brett, J. A., in *Reg. v. Keyn*, 2 Ex. Div. p. 124.

³ See also the Defence Act, 6 & 7 Vict. c. 94, and Amending Acts.

⁴ *Droits des Gens*, t. 1, pp. 109, 110.

⁵ See also *Reg. v. Keyn*, 2 Ex. D. 63, 46 L. J., M. C. 17, *passim*. This question has been much discussed owing to the English Channel Tunnel scheme. On the ground that the tunnel might be a future danger to the nation, the Attorney-General representing the Board of Trade, applied in 1882 for an injunction to restrain the extension of the works at Dover below the line of low water mark. The application was made before Kay, J., and resulted in a compromise and temporary arrangement by which the company agreed to permit the inspection of their works by the officials of the Board of Trade and to discontinue their operations below low water mark until the legal points in dispute should be finally determined by the Courts of law. No further steps have been taken in the matter up to the present date (1902), but the following

statement of the law by M. Ortolan in his *Diplomatie de la Mer*, ed. 1864, 1. pp. 152 *et seq.*, seems conclusive in favour of the Crown:—

"The security of a State, its duty to protect itself, create for it the necessity of watching particularly over its frontiers. In virtue of its right of absolute independence it has the right to regulate at its pleasure, with regard to foreigners, the approaches to its territory. The maritime frontiers of a State are by their nature exposed to unexpected attacks, to sudden invasion; contraband trade and illicit commerce can be organised there on a large scale. A nation ought then to exercise a most vigilant supervision over the vessels of all kinds which may attempt to effect a landing on its shores in a clandestine manner, and even over those which approach too near. The shores and banks of the sea, which mark the coasts of a State, are the natural maritime boundaries of that State. But for the protection, for the more effectual defence of these natural boundaries, the general custom of nations, in accordance with numerous public

As against a subject.

That the Crown can acquire a title to mines below low water mark as against a subject, is shown by the dispute between the Crown and the Duchy of Cornwall, which resulted in the *stat.* 21 & 22 Vict. c. 109. That statute enacts that the mines and minerals below low water mark are, as between the Queen's Majesty in right of her Crown, and his Royal Highness the Prince of Wales in right of his Duchy of Cornwall, vested in her Majesty in right of her Crown, as part of the soil and territorial possessions of the Crown.¹ In *Johnson v. Barrett*,² it was held that a quay below low water mark at Yarmouth belonged to the Crown and that an intruder on the Crown may have an action of trespass against a stranger; whereas in *Blackpool Pier Co. v. Fylde Union*,³ the Court held, on the authority of *Reg. v. Keyn*,⁴ that the part of a pier below low water mark was out of the realm and so not rateable to the poor as an extra-parochial place within 81 & 82 Vict. c. 122, s. 27.⁵

Protection of revenue, etc.

Various treaties and statutes for the maintenance of neutral rights during war, and the prevention of breaches of the revenue and fishery laws are now in force, and most of them recognize three miles as the limit, though this limit is not universal, for it is admitted by international law that a nation is entitled to take such measures as it may deem necessary for the protection of its revenue within a reasonable distance of its shores.⁶

"treaties, permits an imaginary line to be traced on the sea at a suitable distance from the coasts, and following their contours, which is to be considered as an artificial maritime frontier. Every vessel which comes within this line limiting the rights of sovereignty and jurisdiction of the State is said to be within the waters of the State. It is this imaginary line which Pinheiro-Ferreira calls 'ligne de respect,' and within which he justly remarks that the foreigner, even in the absence of all force, ought to conduct himself as if he were upon the territory of the State, and to undertake nothing which the Government of the State would have a right to prevent as threatening the property or safety of the nation." Charged with this particular duty of public defence over the whole of this space, the State has the right to make the regulations and laws necessary for this end, and to employ the public force to ensure their execution there. In a word, the State has over this space not the right of property but the right of empire; a power of legislation of supervision and

"of jurisdiction in conformity with the rules of International Jurisdiction."

¹ See remarks of Cockburn, C. J., on this case, which was much relied on by the defendant in *Reg. v. Keyn*. See also *Lord Advocate v. Wemyss* (1900). App. Cas. 48, H. L. Sc., where it was held that the grant of a barony with power to work minerals *infra fluxum maris* does not extend to minerals below low water mark, as the words of the grant show that it is limited to minerals under the foreshore only.

² Aleyn, 10.

³ 46 L. J., M. C. 189, 36 L. T. 251.

⁴ 2 Ex. D. 63.

⁵ As to right to a jetty under the laws of New Zealand and the Public Works Act, 1882, see *Plimmer v. Wellington (Mayor of)*, 9 App. Cas. 699, 714.

⁶ Cockburn, C. J., 2 Ex. D. p. 216. The question of the sufficiency of the three-mile limit for purposes of protection and security in time of war in view of the enormous increase of the range of modern artillery has been much discussed in late years.

The Institute of International Law in

The result of the authorities seems to be briefly as follows:—

1. The realm of England only extends to low water mark; all beyond is the high sea.

1896 drew up a series of rules which express the almost unanimous opinion of specialists in international law. The chief point adopted, namely, a distinction between the fishery limit and that for other sovereign rights and neutrality, is explained in the following passage from a report to the International Law Association on the same subject by Mr. T. Barclay, to whose initiative the distinction was due:—

“Text-book writers are agreed that “cannon-shot range from shore was the “original basis of the existing three-mile “rule, and they are also agreed that this “distance falls very far short of contemporary cannon range. There are thus “practically two limits from shore “known, at least historically, to international law for the determination of “a State’s jurisdictional zone seawards, “namely, the distance within which the “State can *de facto* exert its authority by “the use of artillery on shore, and the “other a fixed distance of three maritime “miles, which most States in practice “apply. These two distances being no “longer identical it has become a question whether there is not in reality a “distinction of principle between them; “whether the varying and uncertain “cannon-shot limit can be a proper basis “for sovereign rights; and, if it cannot, “whether, on the other hand, it may not “have a juridical basis in respect of the “right of the neutral not to be molested “by acts between belligerents. When “the modern idea of territorial waters “came into existence, neutral States “were protected against acts between “belligerents within a distance which was “then the cannon range. Why should “they no longer be protected within that “range? No change has taken place in “the opinions of men which would “abridge the rights of neutrals. Quite “the contrary. My proposal to the institute, therefore, is to reaffirm due limit “of cannon range as the public law of “Europe, but to confine its application “to the right of the neutral as founded “in reason.” (See report of Brussels meeting of Association, 1895, p. 4.)

If States are not yet agreed whether the proper limit is three miles (Great Britain, France, United States), or six miles (Spain), or cannon range (Germany), they are all agreed that whatever the limit be, fisheries within it are reserved to the subjects and citizens of the adjacent State exclusively, that all States

have a right of innocent passage through territorial waters, but are subject to the jurisdiction of the adjacent State if they cast anchor or hover in them, and that if the adjacent State be neutral, acts of war committed within them are an infringement of its neutrality.

As regards waters which the adjacent State can physically close against navigation, but which are in communication with the high sea, States practically recognise the following distinctions:—

1. Inland waters surrounded by the territory of the same State, and serving only as a means of access to ports of the State, by whose territory they are surrounded, though communicating with the high sea, if the breadth of the channel of communication by its narrowness and the configuration of the coast practically severs such waters from the open sea, are classed with national rivers and their estuaries as inland waters. (The *Zuiderzee*, the North German *Haffs*, the Sea of Azov, are instances of such waters.)

2. Bays, the headlands of which, though wider asunder than twice the ordinary distance seawards of territorial waters, project so as to place them unquestionably beyond the line of what may be called “inter-foreign” communication, are territorial waters. Such bays are the Bay of Cancale, in France (seventeen miles wide) and the Scotch firths. It is difficult, however, to reconcile the practice in these instances with general practice as regards fishery limit.

3. Channels between the territory of the same State, though they can be used in “inter-foreign” communication, if not indispensable or even very useful for such navigation, or if they serve *de facto* only for communication with ports of the adjacent States, are territorial or inland, as the case may be. The St. George’s Channel is an instance of the one, the Solent of the other.

4. Channels indispensable or of extreme utility for “inter-foreign” communication, both shores of which belong to the same State, however narrow, may be held to be territorial waters. Such are the Straits of Messina and The Dardanelles (subject to treaty stipulations).

5. Channels serving for international communication between shores belonging to different States, such as the Straits of Gibraltar, the Sound, the Lymoon Pass, etc., are also territorial waters. (Encyclopædia of the Law of England, p. 132—134.)

2. For the distance of three miles, and in some cases more, international law has conceded an extension of dominion over the seas washing the shores.

3. This concession is evidenced by treaty or by long usage.

4. In no case can the concession extend the realm of England so as to make the conceded portion liable to the common law, or to vest the soil of the bed in the Crown. This must be done by the act of the legislature.

Navigation.

The laws relating to navigation are, with the foregoing exceptions, the same within as without the territorial waters. These waters are free to the peaceful navigation as well by foreign as by English ships.¹ According to international law, it is certainly the right incident to each State to refuse a passage to foreigners over its territory by land, whether in time of peace or war; but it does not appear that a nation has the same right with respect to preventing the peaceful passage of foreign ships in time of peace over this portion of the high seas.²

A foreign vessel, therefore, on a voyage to a foreign port, and having this right of passage over the sea within three miles of the English coast, is not subject to the English municipal law in the absence of express provision by Act of Parliament;³ but a foreign vessel seeking an English port is liable to English law.⁴ By 41 & 42 Vict. c. 73, foreigners on board foreign ships, and passing within three miles of the English coast, are now made subject to the English criminal law.

41 & 42 Vict.
c. 73.

Fishery.

There can be no doubt that by treaty, or by the implied assent of nations, the right of fishing within three miles of the coast of the United Kingdom is vested exclusively in the inhabitants subjects of his Majesty.⁵

By 31 & 32 Vict. c. 45, 46 & 47 Vict. c. 22, 54 & 55 Vict. c. 37, and 56 & 57 Vict. c. 53, the fisheries on the coasts of Great Britain, France, Holland, Germany, Belgium and Denmark are regulated as between the inhabitants of those States; and by the conventions between the countries annexed to the statutes it is provided that British fishermen shall have the exclusive right of fishing on the British coasts within the distance of three miles from low water. The fisheries are regulated by various

¹ *The Saxonia*, 1 Lush. 410.

² Sir R. Phillimore, 2 Ex. Div. 82.

³ *The Saxonia*, 1 Lush. 410.

⁴ *The Annapolis*, 1 Lush. 295; *The Joanna Stoll*, 1 Lush. 295; *Cunningham's*

case, Bell, Cr. C. 72.

⁵ As to this see *Gammel v. Woods and Forests*, 3 McQ. H. L. 419, and *post*, Chap. VI.

statutes prescribing the manner in which fish may be taken, and the close seasons, &c., which will be treated fully in another chapter.¹

It has been laid down that the territory or realm of England is that over which the common law of England extends, or, in other words, all that is within the body of a county, and that the county extends to low water mark, where the high seas begin.² Hence those creeks or arms of the sea which lie within the body of a county will be governed by the rules of law relating to the sea shore and inland tidal waters, which are treated of in the succeeding pages, while those inlets of the sea which do not so lie within the body of a county will form part of the territorial waters of the State, and be governed by the laws relating to such territorial waters which have been stated in the preceding pages.³

Creeks and
arms of sea.

The question as to what portion of the sea is so within the body of a county, is a somewhat difficult one, and is one which, it would appear, must be decided by evidence in each particular case. It is said by Hale that an arm or branch of the sea which lies *intra fauces terre*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county;⁴ and Lord Coke, in the case of *Leigh v. Burley*,⁵ observes that the admiral should have no jurisdiction where a man may see from one side to another, to which the other justices agreed. This view is confirmed by Cockburn, C. J., in *Reg. v. Keyn*, and may be taken to be settled law.⁶ An estuary or arm of the sea is *prima facie* extra-parochial, but this presumption may be rebutted.⁷

¹ See Chap. VI., *post*.

² *Reg. v. Keyn*, 2 Ex. D. 67, 197.

³ A creek or arm of the sea in order to be "navigable" in the legal sense of the term must be affected by the ebb and flow of the ordinary or mean tides. The circumstance that it can be traversed by small boats does not make navigable a creek which is not so affected. *Ilchester v. Rushleigh*, 5 T. L. R. 739; 61 L. T. 477; 38 W. R. 104, see *post*, p. 16 (n. 4).

⁴ *De Jure Maris*, p. 10, Harg. Tracts.

⁵ *Ow*, 122.

⁶ 2 Ex. Div. pp. 164, 168. It is stated by writers on international law that the exclusive territorial jurisdiction of the British Crown has extended immemorially to those bays called the *King's Chambers*—i.e. portions of the sea cut

off by lines drawn from one promontory to another—but it would seem doubtful whether this jurisdiction was anything else than the right of defence before mentioned, which is admitted to exist for the protection of peace and the revenue; see, however, Sir R. Phillimore, *Reg. v. Keyn*, 2 Ex. D. 71; see also Wheaton, *Int. Law*, p. 240; Vattel, *Droit des Gens*, liv. 1, ch. 22, s. 281; Phillimore, *Int. Law*, vol. i. p. 239; *Life of Sir L. Jenkins*, vol. ii. pp. 727, 728, 780. For bays under the conventions between Great Britain and France, as well as under the North Sea Fisheries Conventions, the three-mile limit is measured from a straight line drawn from headland to headland at the point where they are ten miles across.

⁷ *Ipswich Dock Commissioners v. St.*

The Sea Shore.

Definition and limits.

The sea shore may be defined as that portion of the land adjacent to the sea which is alternately covered and left dry by the ordinary flux and reflux of the tides. Although, in common parlance, the word shore has often a more extensive meaning—taking in all that extensive belt of waste ground or strand, shingles, and rock liable to the action of every kind of tide—yet it is now finally settled, that in legal intendment no more of that unclaimed tract is sea shore than that portion which lies between high and low water mark at ordinary tides.¹ This point has been finally settled by the case of *Attorney-General v. Chambers*,² in which the Lord Chancellor Cranworth, assisted by Maule, J., and Alderson, B., held that the sea shore landwards is, in the absence of particular usage, *primâ facie* limited by the line of the medium high tide between the spring tides and the neap tides; or, in other words, that part of the shore which for four days in every week, or for the most part of the year, is reached and covered by the tides.³ As this line will vary as the sea recedes from or encroaches on the land, so the boundaries of the shore will vary with the recession or encroachments of the sea.⁴ Land above this line, though overflowed by high spring and extraordinary tides, is not shore, but is presumed to be land the property of adjoining owners.⁵

Forms part of the body of

The sea shore, as above defined, forms part of the body of the

Peter's, Ipswich, 7 B. & S. 310; *Trustees of Duke of Bridgewater v. Bootle-cum-Linacre*, 7 B. & S. 348; *Reg. v. Munnion*, 8 E. & B. 900; *McCannon v. Sinclair*, 2 E. & E. 53.

¹ Moore's History of the Foreshore (Hall on the Sea Shore), 3rd ed. p. 674.

² 4 De Gex, M. & G. 206, 23 L. J. Ch. 662; see *Lord Adc. v. Wemyss*, (1900) A. C. 48, H. L. Sc.

³ See also *Blundell v. Catteral*, 5 B. & Ald. 268, 24 R. R. 353, per Holroyd, J.; and *Lowe v. Gorett*, 3 B. & A. 813, 37 R. R. 560, per Lord Tenterden, C. J.; see *Ilchester v. Rashleigh*, 5 T. L. R. 739; 61 L. T. 477; *Reece v. Miller*, 8 Q. B. D. 626; 51 L. J., M. C. 647. As to definition of "bed" of a tidal river, see *Thames Conservators v. Smeed*, (1897) 2 Q. B. 334.

⁴ *Scratten v. Brown*, 4 B. & C. 485, 28 R. R. 344. "When a landholder is bounded by the sea, it is true he has a bounding charter. But it is a boundary moveable and fluctuating *sue naturæ*; and when the sea recedes he must be entitled still to preserve it as his

"boundary. The shore is, indeed, still "*publici juris*"; but when the sea goes back the shore advances, and the proprietor is entitled to follow the water "to the point at which it may naturally retire, or be artificially embanked." (*Campbell v. Brown*, cited with approval by Lord Watson, in *Lord Adc. v. Young*, 12 App. Cas. 544.)

Where the Crown seeks to recover lands alleged to have been reclaimed from the sea by encroachments or purprestures and the defendant disputes the Crown's title to the soil between the *present* high and low water marks, the Court will direct an issue to try that point before inquiring into the old boundaries; while, if the defendant admits the Crown's title to the soil between the present high and low water marks, the burden is laid upon the Crown of proving that the high water mark formerly extended further than it does at the present time. (*A.-G. v. Chamberlaine*, 1858, 4 Kay & J. 292.)

⁵ *Lowe v. Gorett*, 3 B. & A. 813, 37 R. R. 560.

adjoining county, the justices of which, and not the admiralty, have cognizance of offences committed there, whether committed when the shore is or is not covered with water;¹ it does not, however, in the absence of evidence, form part of the adjoining parish, but is *primâ facie* extra-parochial. It may be in a parish or a manor, but there is no presumption of law that it is within either.² Now, however, by 31 & 32 Vict. c. 122, s. 27, every accretion from the sea, whether natural or artificial, and the part of the sea shore to the low water mark, are annexed to and incorporated with the parish to which they adjoin, in proportion to the extent of the common boundary, for all civil parochial purposes; and are therefore liable to be rated to the poor. This statute has been held not to apply to the part of a pier extending below low water mark, and built on iron piles driven into the sands, so that the water flowed under it, no alteration being made in the line of low water mark—the Court holding that, on the authority of *Reg. v. Keyn*, this portion of the pier was out of the realm and jurisdiction of England, and that it moreover was not an “accretion” within the words of the Act.³ The shore was held to be an extra-parochial place within the Nuisance Removal Act, 18 & 19 Vict. c. 121, s. 22,⁴ since repealed by the Public Health Act, 1875, 38 & 39 Vict. c. 55.

the adjoining county, but not *primâ facie* of the adjoining parish or manor.

The property in the soil of the shore of the sea, of estuaries and arms of the sea, and of navigable rivers between high and low water mark, is *primâ facie* vested of common right in the Crown;⁵ but it may belong to a subject by ancient grant or charter from the Crown, or by prescription.⁶ This ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the public rights of navigation and fishery. The *primâ facie* right of the Crown to the soil of the bed, as distinguished from the shore of

Property in soil of the shore between high and low water mark in the Crown.

¹ *Embleton v. Brown*, 3 E. & E. 234; *Reg. v. Musson*, 8 E. & Bl. 900.

² *Reg. v. Musson*, 27 L. J., M. C. 100, 8 E. & Bl. 900; *D. of Bridgewater's Trustees v. Bootle-cum-Linacre*, L. R., 2 Q. B. 4, 15 L. T. 351; see also *Reg. v. Gee*, 1 E. & E. 1068; see *Perrott v. Bryant*, 2 Yard. 61, where oyster layings, in respect of which tithe had been paid for sixty years, were held intra-parochial and titheable.

³ *Blackpool Pier v. Fylde Union*, 46 L. J., M. C. 129, 36 L. T. 251.

⁴ *Reg. v. Gee*, 1 E. & E. 1068.

⁵ *Mayor of Penryn v. Holme*, 2 Ex. Div. 328; *Gann v. Free Fishers of Whit-*

stable, 11 H. L. 192, 35 L. J., C. P. 29, 12 L. T. 150; *A.-G. v. Parmeter*, 10 Price, 378, 24 R. R. 723, 745; *Smith v. Officers of State of Scotland*, 13 Jur. 713; *Blundell v. Cuttrel*, 5 B. & Ald. 268, 24 lt. R. 353; *A.-G. v. Chambers*, 4 De G. M. & G. 206; *Bagot v. Orr*, 2 Bos. & Pull. 472, 5 R. R. 668; *A.-G. v. Emerson*, (1891) App. Cas. 649; *A.-G. v. Portsmouth*, 25 W. R. 559; *Ilchester v. Rashleigh*, 5 T. L. R. 739; 61 L. T. 477; see also *Bristow v. Cormican*, 3 App. C. 541; *Malcolmson v. O'Dea*, 10 H. L. 593.

⁶ *Culmady v. Rwe*, 6 C. B. 861; *A.-G. v. Jones*, 33 L. J., Ex. 249; see also cases at p. 15 of Hall on the Sea Shore.

estuaries and arms of the sea within the body of a county would appear to extend to the whole area affected by the tides and not to depend, as in the case of tidal rivers, on the question of navigability.¹ This question has never been actually decided in this country; but it seems manifestly absurd to suppose that whereas the shores of a tidal creek between high and low water mark *primâ facie* belong undoubtedly to the Crown, the soil of the bed should belong to any other person.² The beds of these creeks being within the body of a county are within the realm and therefore the property of some one, and not like the sea below low water mark, unappropriated. In the case of *Lord v. Commissioners of Sydney*,³ a grant of land by the Crown bounded by a non-navigable creek of Botany Bay has been held to pass the soil of the creek *ad medium filum aque*, as the description of the boundaries in the grant did not exclude from it that portion of the creek which by the general prescription of the law would go along with the ownership of the land on the banks of it. The principle on which this decision is founded seems certainly to place non-navigable creeks of the sea on the same footing as non-navigable rivers, but it is not stated in the report that the creek was "tidal," and the Crown being as a matter of fact owner of the adjoining land in the *locus in quo* the general question of the extent of the Crown ownership in tidal non-navigable creeks did not actually arise. In any case the Crown as owner of the land next adjoining the bed of the sea, viz., the foreshore between high and low water mark, would be the natural owner of the bed of such creeks.⁴

¹ See *Gann v. Free Fishers of Whitstable*, 11 H. L. 192, 35 L. J., C. P. 29, 12 L. T. 150; *Malcolmun v. O'Deu*, 10 H. L. 593; and see *Bristow v. Cormican*, 3 App. Cas. 641, per Lord Blackburn, at p. 666.

² See judgment of Lord Denman, C. J., in *Mayor of Colchester v. Brook*, post, p. 41; see *Reg. v. Musson*, 4 E. & E. 53, per Blackburn, J.

³ 12 Moo. P. C. 473.

⁴ In *Chester (Earl) v. Rushleigh*, 5 T. L. R. 739; 61 L. T. 477; 38 W. R. 104, before Kekewich, J., in the Chancery Division, the plaintiff claimed to have a number of persons restrained by injunction from committing trespasses on a piece of water called the Fleet, adjoining Portland Road, and separated from the English Channel by the Chesil Bank or Chesil Beach, and from committing certain trespasses on the Chesil Bank and

disturbing a certain decoy and game of swans. The plaintiff also claimed to be entitled to the land covered by water and known as the Fleet, which is of varying width, and is described in his pleadings as extending from Portland Ferry Bridge to Reeds End Boathouse, near Abbotsbury, and also to the Chesil Beach and a decoy in the Fleet in a bay at the most westerly end thereof. This decoy extends over several acres, and in it are a great number of swans, which the plaintiff claimed as his property. Within the Fleet there has been, time out of mind, as the plaintiff alleges, a game of swans building, nesting, and breeding there. The plaintiff conceded the right of the defendants and other persons having lawful occasion to do so to cross so much of the Fleet as is not bounded by the parish of Abbotsbury, but alleged that the trespasses complained of were on

The ownership of the Crown in the sea shore is compared by Lord Hale to the ownership of lords of manors in the common and waste lands of the manor. The soil and freehold of the waste belong to the lord, but subject to certain rights of manorial tenants; so the king is lord of the great waste of the sea, subject to certain beneficial rights and privileges of fishing, navigation, &c., immemorially enjoyed by his subjects therein by the custom of the realm, which is the common law.¹ The grantee of the Crown takes subject to this public right, and he cannot, in

But subject
to public
rights.

other parts of the Fleet. The Fleet is connected with Portland Road by a narrow passage called Portland Passage at the east end of the Fleet, and the majority of the defendants contended that the Fleet was a salt water inlet or arm of the sea, and along its entire length within the flux and reflux of the tide. The plaintiff denied that it was navigable in the legal sense of the word, or that it was perceptibly influenced by the tide. At the trial, on the suggestion of his Lordship, the plaintiff, with regard to his claim to prevent defendants from landing upon or trespassing upon the Chesil Beach, limited his claim to an injunction with respect to the soil above high water mark; but as a concession with respect to the present action only, and not as an abandonment of the further rights claimed. Also, with respect to the navigation of the Fleet, he sought to protect his rights only as regarded so much of the Fleet as was situate between the westernmost point thereof and a point 250 yards west of the Abbotsbury Stone above mentioned. The plaintiff's title to the Fleet and the Chesil Beach were by grant from the Crown.

Evidence was brought on the question of the tidality of the water in the Fleet, and as to how far the ebb and flow extended, there being evidence that at times there was a sufficiency of water all along the Fleet to allow of some boats of light draught to navigate it, while at other times certain parts were dry for days together. The result of the evidence, however, in the opinion of the Court, was to establish that in the western part of the Fleet, being the part in question, there was no diurnal ebb and flow of the tide.

Held that :—

A creek or arm of the sea, in order to be navigable, in the legal sense of the term, must be affected by the ebb and flow of ordinary or mean tides. The circumstance that it can be traversed by small boats does not make navigable

a creek which is not so affected. The rights of private owners over the foreshore extend down to ordinary high water mark, and there is no legal right for fishermen (apart from exceptional circumstances, such as stress of weather) to draw or to leave their boats above that line. Land may be said to be covered with "navigable" water although at different times of short duration dry portions of the land may be seen. When, however, such portions of the land are dry for days together this excludes the notion of navigability.

The legal and technical meaning of the word "navigable" requires not only that navigation should be possible, but also that there should be ebb and flow of the tide. (*Murphy v. Ryan*, 2 Ir. Rep., C. L. 153, referred to by Kekewich, J., as to the fact that "navigable" has a popular as well as a legal and technical meaning, 5 T. L. R. p. 741.)

"He (plaintiff) admits, as he was bound to do, that deriving title to the foreshore by Royal grant, he can claim nothing that was not originally vested in the Crown, and that paramount to the right of the Crown in the open sea is the right of the public to navigate and fish. It has long been settled that this right does not extend to places only occasionally covered by water, and the necessity of laying down some rule of reasonable certainty has introduced one which fully supports the claim above mentioned. It was solemnly decided in *Attorney-General v. Chambers* (4 De G. M. & G. 206) in 1854, and it has never since been questioned, that the average of the medium tides in each quarter of a lunar revolution during the year gives the limit in absence of usage to the rights of the Crown on the sea shore. There is here no evidence of usage to interfere with the application of this rule."

¹ *De Jure Maris*, c. iv.; Hall on the Sea Shore, p. 4.

respect of his ownership of the soil, make any claim, or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.¹

Nuisances. Any interference with the public rights is a nuisance and the subject of indictment or information, and of an action on proof of special damage.²

Purprestures. Any unauthorized intrusion or encroachment on the soil of the shore, such as the building of quays, piers, moles, &c., is termed a *purpresture*, and may be abated by the Crown or the owner of the shore,³ or restrained by injunction at suit of Attorney-General, whether they create a nuisance or not.⁴ Such *purprestures* may or may not be nuisances to the navigation; whether they are so or not is a question of fact.⁵

Wreck, royal fish, and several fishery. The right to take wreck and royal fish, and the right before Magna Charta to create a several fishery to the exclusion of the public, belong to the Crown as a part of the royal prerogative distinct from the ownership of the shore, and may, as such, be communicated to the subject by grant or charter.⁶

Management. The duty of administering the rights of the Crown in the foreshores of the kingdom is vested chiefly in the Board of Trade, to which all the authority till then exercised by the Commissioners of Woods and Forests (since 1830) was transferred by 29 & 30 *Vict. c. 62* (ss. 17, 20, 21 and sched.); *except* the foreshores in the Thames, Tees, and Durham, and those fronting and adjacent to Crown lands, and mines under the foreshores. Among the powers thus given to it, are those of leasing foreshores or derelict lands for ninety-nine years (under 8 & 9 *Vict. c. 99*), and of compromising the Crown's disputed claims with the consent of the Treasury under 16 & 17 *Vict. c. 56, s. 5*. The Board has also the power, formerly vested by 25 & 26 *Vict. c. 69*, in the Admiralty, of preventing ballast and shingle from being taken from the shores of ports; and as to this it has been decided in

¹ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192, 35 L. J., C. P. 29, 12 L. T. 150.

² *R. v. Grosvenor*, 2 Stark. 511, 20 R. R. 732; *Duke of Newcastle v. Clark*, 2 Moo. Rep. 666, 20 R. R. 583; *R. v. Clark*, 12 Moo. 615; *A.-G. v. Richards*, 2 Anstr. 613, 3 R. R. 632; *Rose v. Miles*, 4 M. & S. 161, 16 R. R. 405; see *Smith v. Stair (Earl of)*, 2 H. L. Cas. 807; 13 Jur. 713. Where a proprietor of a feu, described in the feu charter as bounded by the sea shore, enclosed a portion of the sands which it was proved

that the public had immemorially used for purposes of enjoyment and otherwise: *held*, that the feuor being a wrongdoer, the officers of the Crown, irrespective of the right of property, were entitled to the interdict.

³ 4 Blackstone's Comm. 271, note; Angell on Tide Waters, 198.

⁴ See *post*, as to REMEDIES, Chap. X.

⁵ *Reg. v. Betts*, 16 Q. B. 1022; *R. v. Randall*, Car. & M. 496; *A.-G. v. Terry*, L. R., 9 Ch. 423, 30 L. T. 215.

⁶ See *post*, p. 42.

Nicholson v. Williams,¹ that the owner of the foreshore may not take shingle from the shores of ports, harbours, or havens (54 *Geo. III. c. 59, s. 14*), and that the word "ports" is here used in its wide sense of ports as appointed by the Treasury for customs and fiscal purposes.³

There is no doubt that a subject may be owner of a portion of the sea shore by express grant from the Crown.³ The alienation of Crown lands is now, however, prohibited by statute law;⁴ and so much therefore of the sea shore as has not actually been alienated still remains vested in the Crown, incapable of alienation except under powers conferred by the above-cited statutes.

Title by express grant of the Crown to a subject.

The ownership of the Crown in the sea shore being, as has been said, for the public benefit, grants of portions of it to an individual subject are, as it were, an encroachment on the public right and against good policy; and, therefore, the Courts are inclined to construe such grants strictly in favour of the Crown *pro bono publico* and against the grantees.⁵ The burden of proof is in all cases on the claimants, and unless they make out a good title judgment must be for the Crown.⁶ The same rules, however, of common sense and justice must apply in the construction of a deed, whether the subject-matter of construction be a grant from the Crown or from a subject—it being always a question of intention to be collected from the language used with reference to the surrounding circumstances.⁷ Thus in the Scotch case, *Lord Advocate v. Wemyss*,⁸ the House of Lords held that the doctrine of possession by prescriptive working for minerals applicable to the foreshore *ex adverso* of a barony granted with parts and

¹ L. R., 6 Q. B. 652.

² Encyclopædia of Laws of England, "Foreshore," p. 451. Cf. as to the latter point *Thames Conservators v. Sneed*, (1897) 2 Q. B. 334, and *London Port Sanitary Authority v. Thames Conservators*, (1894) 1 Q. B. 647; as to procedure in such cases see *post*, Chap. X.

³ Moore's History of Foreshore (Hall on Sea Shore, 3rd ed.), pp. 672—683; *A.-G. v. Portsmouth*, 25 W. R. 559; see, also, as to construction of such grants, *A.-G. v. Hammer*, 4 De G. & J. 200; *Ranfurlley. Ex parte*, 1r. R., 1 Eq. 128; see also *A.-G. v. Ceeley*, Wightwick, 208; *A.-G. v. Plymouth*, Wightwick, 134; 12 R. R. 719, where the Crown was held entitled to Sutton Pool *semble* under grant from a subject; *Tyner v. Mersey Docks*, 14 C. B., N.S. 753,

where foreshore was granted to different persons in succession by the Crown: *held*, that first grantee was entitled.

Quære, whether the Crown can grant lands under sea, which after grant become derelict, and as to what words are necessary to pass such lands. (*A.-G. v. Farmer*, 2 Lev. 172; Sir T. Raymond, 246; 2 Mod. 106.)

⁴ 1 Anne, c. 7, s. 5; *Doe d. R. v. York*, 14 Q. B. 81.

⁵ See *Royal Fishery of the Banne*, Davies' R. 157; *D. of Somerset v. Pigwell*, 5 B. & C. 875, 29 R. R. 449; Moore's History of Foreshore, p. 682.

⁶ *A.-G. v. Portsmouth*, 25 W. R. 559 (C. A.).

⁷ *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473.

⁸ (1900) App. Cas. 48, H. L. Sc.

pertinents cannot be extended to a barony granted with power to work minerals below low water mark, because the words showed that the grant was limited to minerals under the foreshore only. Nor can such prescriptive use be extended to a third barony where a barony with boundary charter lies between.

By prescrip-
tion.

In absence of express grant of the shore, the question arises whether a title to it as against the Crown can be acquired by a subject by user and prescription, giving rise to the presumption of a grant.

Hall, in his essay on the *Sea Shore*,¹ discusses this point elaborately, and comes to the conclusion that as the shore is land, it must be governed by the same rules of law as to title and proof of title as *terra firma*; and that as prescription and user can give no title to lands, especially as against the Crown, such title, in the absence of express grant, can only be supported by evidence of adverse possession for the full period prescribed by the Statutes of Limitations relating to Crown lands—viz. sixty years. He further argues that the evidence capable of supporting such adverse possession must be similar to that which will support a claim by adverse possession to inland estates—viz., evidence of occupation and actual possession; and that, therefore, the user of rights and privileges—such as the right to wreck, several fishery, royal fish, and, perhaps, digging sand, which are separable from the ownership of the soil, and do not imply a title to it—cannot be evidence to support a claim to absolute ownership of the soil.¹

Phear, in his *Rights of Water*, takes a view more favourable to claimants against the Crown. “Almost all beneficial enjoyment “of land,” he says, “is necessarily so exclusive in its character “as to leave but little opening for question as to its possession. “It is only with regard to waste land, waters and the sea shore “that any real doubt can arise. On the other hand, of these “latter the sea shore especially is, by its very nature, so little “capable of exclusive possession, that the most undoubted owner “of it finds it very difficult to support his title by user. In some “sense, ownership may be said to be an aggregate of exclusive “easements; the greater the number of them which are openly “exercised, the stronger is the probability of the greater right “being the true foundation of that exercise. Where, as in the “case of the sea shore, the incidents of enjoyment are very few,

¹ Moore's History of Foreshore, pp. 682—7(9).

“it is not easy to say whether the user of one or two of them is
 “to be referred to the greater or the lesser right. No general
 “rules of guidance can be laid down, but perhaps it may be
 “assumed, that to make acts evidence of ownership, they must
 “appear, under the circumstances which surround them, to have
 “been done *animo habendi, possidendi et appropriandi*.”¹

Which of these views of the law would be held correct in the case of a claim by a subject to a portion of the sea shore *in gross*, where the actual title as against the Crown would be in dispute, cannot be said to be as yet determined,² as there appears to be no reported case in which such a claim has been advanced on the ground of the exercise of such rights alone; but in the case of claims to foreshore, as forming parcel of manors,³ and even as forming parcel of lands adjacent to the sea, where the manor is not expressly granted,⁴ or of a borough,⁵ the Courts have adopted the more liberal construction, holding that evidence of the user of various rights and privileges is admissible to show that the part of the shore claimed forms parcel of the adjoining manor or lands. This proposition is stated with authority by Lord Watson in a late case which came before the House of Lords on appeal from the Courts of Scotland:⁶

“There is in my apprehension, or ought to be, a practical
 “distinction recognized between the prescriptive possession which
 “establishes a new and adverse right in the possessor, and the
 “prescriptive possession which the law admits, for the purpose
 “of construing or explaining, in a question with its author, the
 “limits of an antecedent grant or conveyance. In the first case
 “the rule obtains *tantum prescriptum quantum possessum*. In the
 “second, it appears to me a much more liberal effect has been
 “given to partial acts of possession as evidencing proprietary
 “possession of the whole, in cases where the subject of contro-
 “versy has been in itself a distinct and definite tenement. The
 “foreshore is simply a tract of land, at times covered by the tide,
 “and at other times dry, and is in many respects attended with
 “the same incidents as land estate situated above the level of

¹ Phear on the Rights of Water, p. 88.

² See *Aynew v. Lord Advocate*, 11 Ct. Sess. Cas., 3rd series, 309; *Macalister v. Campbell*, 15 D. B. & M. Sess. Cas. 490.

³ *A.-G. v. Jones*, 2 H. & C. 347; *In re Belfast Dock*, Ir. R., 1 Eq. 128; *A.-G. v. Chambers*, 4 De G. & J. 55; *A.-G. v. Blantyre*, 4 App. Cas. 770.

⁴ *Chad v. Tilsed*, 5 Moo. 185, 23 R. R. 477; *Brew v. Haren*, Ir. R., 11 C. L. 198; *Lord Advocate v. Young*, 12 App. Cas. 544.

⁵ *A.-G. v. Portsmouth*, 25 W. R. 559 (C. A.).

⁶ *Lord Advocate v. Wemyss*, (1900) A. C. 48, H. L. Sc.

“high tide. When the subjacent minerals have not been severed from it in title, an absolute grant of foreshore will, just as in the case of other land, carry the whole materials below it *usque ad centrum*, and in the absence of express grant, the fact of the baron’s having worked a mineral seam below it might be reasonably regarded as a strong act of possession, to be taken into account along with other acts and circumstances, in determining whether he and his predecessors in title had been in prescriptive proprietary possession of the whole foreshore.

“For a definition of what will constitute sufficient evidence of such possession, I may refer to the remarks made by Lord Blackburn in *Lord Advocate v. Lord Blantyre*:¹ ‘Every act shown to have been done on any part of that tract by the barons or their agents which was not lawful unless the barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive, and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession proved was. This is very clearly explained by Lord Wensleydale (then Baron Park) in *Jones v. Williams*.² And as the weight of evidence depends on rules of common sense I apprehend that this is as much the law in a Scotch as in an English Court. And the weight of the aggregate of many such pieces of evidence taken together is very much greater than the sum of the weight of each such piece of evidence taken separately.’”

In actions against mere trespassers, a sufficient possessory title can be established by persons claiming foreshore, without producing evidence sufficient to displace the title of the Crown.³

¹ 4 App. Cas. 770, 791.

² 2 M. & W. 326, 633, 46 R. R. 611.

³ *Corporation of Hastings v. Irall*, L. R., 19 Eq. 558. “Actual possession of

“the *locus in quo* would have been not “merely evidence of title, but actually “a title against wrongdoers.” Per Lord Blackburn, in *Bristow v. Cormican*, 3

There is no doubt that the foreshore may form parcel of a manor;¹ and in fact claims to foreshore by a subject are almost invariably made by lords of sea-side manors.²

Foreshore may form parcel of a manor.

Where the grant of the manor is express and unambiguous, the title to the shore will depend wholly on the construction of the metes and boundaries of the grant, which will, as has been said, be construed *stricto jure* in favour of the Crown and against the grantee.³ Thus if the boundary be expressed to be down to the sea, it is presumed that the ordinary high water mark is intended as the boundary line; but if it is expressed to be down to low water mark, this will be tantamount to a grant of the shore.⁴

Effect of grant of sea-coast manors.

In fact land granted, whether situate upon the sea coast or inland, is co-extensive with the words of the grant, and no more. A grant, therefore, of a sea coast manor does not necessarily include the foreshore, though it may do so.⁵

Where the owner of an adjoining manor, whose title to the manor from the Crown is not disputed, claims a portion of the sea shore as forming parcel of that manor, the question is really one of boundary, and not of title; and in such cases it has been decided that acts of continuous ownership, including under this head such rights as those of taking wreck and royal fish, digging and selling stones and sand, and cutting seaweed, building a retaining wall, working minerals under the foreshore, and the enjoyment of an exclusive fishery, may be called in to explain the

Acts of ownership admissible to prove extent of grant.

App. C. 660. See also *Smith v. Stair (Earl of)*, 2 H. L. Cas. 807; 13 Jur. 713; *Reg. v. Downing*, 23 L. T. 398; *Johnson v. Barrett*, Aleyn, 10; Moore's History of Foreshore, p. 661.

¹ *Calmady v. Rowe*, 6 C. B. 861; *Duke of Beaufort v. Swansea*, 3 Ex. 413; *Sir H. Constable's case*, 5 Rep. 107; *Sir John Constable's case*, Anderson, 36; *Ranfurley, Ex parte*, Ir. R., 1 Eq. 128; Hale de Jure Maris, Harg. Tracts, 27; *Case of Barons of Barclay*, Harg. Tracts, 34; *Aldon's Estate, In re*, 5 W. R. 189; *A.-G. v. Portsmouth*, 25 W. R. 559; *Lord Advocate v. Blantyre*, 4 App. Cas. 770; *In re Tomline*, 28 L. T. 12.

² *Prima facie*, the foreshore in the Duchy of Cornwall is within the parliamentary grant to the Black Prince and inalienable, but evidence of enjoyment by owners of adjoining manors may justify the presumption of a statute vesting it in them. (*Lopes v. Andreux*, 3 M. & R. 329.)

³ But see *ante*, p. 19.

⁴ In *Corporation of Hastings v. Irall*, L. R., 19 Eq. 558, where there was a grant by Queen Elizabeth of all that her parcel of land called the "Stone Beache," it was held that, as the name Stone Beach now applied to the entire beach below as well as above high water mark, such grant, *as against a person not claiming any title himself*, must be presumed to include the whole foreshore. In *A.-G. v. Hammer*, 4 De G. & J. 200; 6 W. R. 804. under a grant of waste lands or marsh grounds the foreshore of a tidal river has passed on proof of user; and a grant by the Crown of "all coals "under commons, waste grounds or "marshes" of a certain manor has been held to pass coal lying under the space between high and low water mark on the shore of such manor. See also *In re Belfast Dock*, Ir. R., 1 Eq. 128.

⁵ Hale de Jure Maris, p. 18; *Agnew v. Lord Advocate*, 11 Ct. Sess. Cas., 3rd series, 309.

grant and to prove the portion of the sea shore claimed to be within the boundaries of the manor granted.¹

Thus it has been held, that where the Crown granted all the regions, countries, or territories of C., and the boundary seaward was the bank of the bay of K., as the description did not necessarily exclude from the grant the shore of the bay between high and low water mark, continuous acts of ownership were admissible against the Crown to prove that the foreshore was included in the grant.²

So in *A.-G. v. Jones*,³ on the trial of an information of intrusion, the question being as to the title of the defendant as against the Crown to the sea shore between high and low water mark, the defendant gave in evidence a grant of a manor, with fishery, wrecks of the sea, &c.; and also gave in evidence various acts of ownership, such as taking sand and gravel, and preventing others from doing so. The learned judge told the jury that the grant of the manor did not pass the shore, and left it to the jury to say whether they were satisfied by the evidence of user that the defendant had acquired a title as against the Crown; but the Court of Exchequer held this a misdirection, and that the proper question for the jury was, whether the evidence of user, *coupled with the grant*, satisfied the jury that the defendant had such title.

In *The Duke of Beaufort v. Swansea*,⁴ it was held that the sea shore between high and low water mark may be parcel of the adjoining manor; and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible as evidence to show that the sea shore is parcel of the manor; the Court in this case holding that a grant of the *Terra or Seignory de Gower* was equivalent to the grant of a manor.

In the case of *Brew v. Haren*,⁵ the Irish Court of Exchequer

¹ *A.-G. v. Jones*, 2 H. & C. 347; *Case of the Barons of Burelay*, Harg. Tracts, 34; *Culmady v. Rowe*, 6 C. B. 861; *A.-G. v. Tomline*, 14 Ch. D. 58; 12 Ch. D. 214; *Listrage v. Rowe*, 4 F. & F. 1048; *Daly v. Murray*, 17 L. R. Ir. 185; *Lord Advocate v. Young*, 12 App. Cas. 544; *Lord Advocate v. Wemyss*, (1900) A. C. 48 H. L. Sc.; *A.-G. v. Emerson*, (1891) App. Cas. 649; *Agnew v. Lord Advocate*, 11 Ct. Sess. Cas., 3rd series, 309; *Donegal v. Templemore*, 9 Ir. C. L. R. 374; *Walton-cum-Tinley Manor, In re Tomline*, 28 L. T. 12. Evidence of acts of ownership on parts of the foreshore

which are separated and divided from the part in dispute by foreshore are not admissible to prove a title to the whole tract of which they form part. (*A.-G. v. Portsmouth*, 29 W. R. 559.)

² *In re Belfast Dock*, Ir. R., 1 Eq. 128.

³ 2 H. & C. 347; see also *Culmady v. Rowe*, 6 C. B. 861; and *In re Belfast Dock*, Ir. R., 1 Eq. 128; *Healy v. Thorow*, Ir. R., 4 C. L. 495.

⁴ 3 Exch. 413.

⁵ Ir. R., 11 C. L. 198; Ir. R., 9 C. L. 41; see *Lee v. Brown*, 2 Mod. 69; *Pollexfen*, 410, sub nomine *Lea v. Browne*.

Chamber have held, that where lands specifically described by name adjoining a sea shore were granted, and also all and singular lands, tenements, &c., thereto belonging, &c., evidence, such as the taking of seaweed by the plaintiff immemorially, and numerous convictions obtained by the plaintiff at petty sessions of persons whom he had prosecuted for taking seaweed in the *locus in quo*, and also that he had brought a former action against an alleged trespasser, in which, after a submission to arbitration, there was an award in his favour, which was made a rule of Court, was admissible as against a mere trespasser to prove that the shore passed under the grant, though the grant was not of a manor.

In *Mulholland v. Killen*,¹ a title to the foreshore, as it would appear, in *gross*, was held, as against a trespasser, to be supported by proof, that for sixty years the owner had let portions of it at yearly rents, had kept a bailiff to protect the seaweed, had issued regulations to govern the conduct of his tenants on the shore, and had issued licences to cut seaweed and dig gravel.

In *Chad v. Tilsed*,² where there was a grant of wreck from Hen. II. to the Abbey of Cerna, by all their lands upon the sea, confirmed by *inspeximus* of Hen. VIII., and a subsequent grant of the island of B. and its shores, belonging to the late Abbey of C., supported by evidence that between forty and fifty years ago the owner of B. raised an embankment across a small bay, and had ever since asserted an exclusive right to the soil, it was held that although the usage of forty years could not of itself establish an exclusive right to the shore and destroy the rights of the public, yet it was evidence from which prior usage to the same effect might be presumed, and which, coupled with the general words of the grant, served to establish such right.

In *Lord Advocate v. Lord Blantyre*³ parties holding barony titles to lands situated on both sides of the Clyde, a navigable tidal river, claimed, as against the Crown and the Clyde Navigation Trustees, that the foreshore *ex adverso* their lands belonged in property to them, subject to such rights of navigation or other rights which the public and the Clyde Trustees might have over the same. The barony titles contained no express grant of foreshore, nor did they contain any specific boundaries which could be held to include the foreshore. The parties rested their

¹ Ir. R., 9 Eq. 471; *Healy v. Thorne*, Ir. R., 4 C. L. 495.

² 5 Moore, 185, 23 R. R. 477.

³ 4 App. Cas. 770.

claim on the grounds (1) that the barony titles alone gave them the property; (2) that coupled with their titles they had exercised from time immemorial acts of possession over the foreshore:—

The House of Lords *held*, affirming the decision of the Court below, that the acts of possession for the prescriptive period having been proved, and following on barony titles to lands so situated, they constituted a right of property in the foreshore.

Held, also, that in this case it was not necessary to decide the question whether a barony title to lands so situated, which does not specify the exact boundary of the lands or contain any express grant of foreshore, could alone give a right of property in the foreshore.

What acts of ownership sufficient to establish a claim to foreshore.

From these cases it is clear that certain acts of ownership are admissible to prove that the foreshore is within the boundaries of a grant of land on the sea shore; what acts of ownership, however, are sufficient to establish such a claim, it is not so easy to say.

In *Lord Advocate v. Lorat*,¹ Lord O'Hagan says: "As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts implying possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests—all these things greatly varying, as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession."

"It is, in my opinion," says Lord Watson,² "practically impossible to lay down any precise rule in regard to the character and amount of possession necessary in order to give a riparian proprietor a prescriptive right to foreshore. Each case must depend upon its own circumstances. The beneficial enjoyment of which the foreshore admits, consistently with the rights of navigators and of the general public, is an exceedingly variable quantity. I think it may be safely affirmed that in cases where the sea shore admits of an appreciable and reasonable amount of beneficial possession, consistently with these rights, the riparian proprietor must be held to have had possession, . . . if he has had all the beneficial uses of the

¹ 5 App. Cas. 288.

² *Lord Advocate v. Young*, 12 App. Cas. 544, at p. 553.

“foreshore, which would naturally have been enjoyed by the direct grantee of the Crown. In estimating the character and extent of his possession it must always be kept in view that possession of the foreshore, in its natural state, can never be, in the strict sense of the term, exclusive. The proprietor cannot exclude the public from it at any time; and it is practically impossible to prevent occasional encroachments on his right, because the cost of preventive measures would be altogether disproportionate to the value of the subject.”

The chief proprietary acts for which the sea and sea shore afford scope, appear to be:—

1. Taking wreck.
2. Taking royal fish.
3. The various incidents of a port.
4. An exclusive right of fishing.
5. Mining, digging, and taking sand, seaweed, &c.
6. Taking salvage for grounding of ships.
7. Embanking and inclosing.
8. Punishing purprestures or intrusions, *i.e.*, trespasses.

The first three of these are not incidents to the possession of the soil, but exist independently as franchises or prerogative rights of the Crown, and though Phear¹ argues that they cannot be adduced as evidence of title to the shore, this statement of the law has not been adopted by the Courts, as in the case of *Dickens v. Shaw*,² though it was held that the right of the lord of a manor to take wreck was not sufficient alone to confer a title on him by presumption of law to the ownership of the soil, yet the Court was clearly of opinion that it might be evidence of such ownership, particularly if coupled with other acts of enjoyment.

In *Hamilton v. A.-G. for Ireland*,³ in the absence of a special grant of the sea shore, evidence of a custom to take wreck of the sea, “flotsam and jetsam, waifs and strays,” was held admissible to prove a title to the shore.

With regard to the ownership of a several or exclusive right of fishery, as giving a right to the soil of the sea shore, in the case of *The Duke of Somerset v. Fogwell*,⁴ the Court seemed to be of

¹ Page 89.

² Moore's History of Foreshore (Hall on the Sea Shore), pp. 651, 889; see also *Listrage v. Rowe*, 4 H. & F. 1048.

³ 5 L. R., Ir. C. L. 555; see also *A.-G. v. Jones*, 2 H. & C. 347, and cases in

note (1), p. 24, *ante*.

⁴ 5 B. & C. 375, 29 R. R. 449; see also *Scrutton v. Brown*, 4 B. & C. 485, 28 R. R. 344; *R. v. Ellis*, 1 M. & S. 652; *Gray v. Bond*, 5 Moo. 527, 23 R. R. 530; Hale de Jure Maris, Harg. Tracts, 34.

opinion, that though the owner of a several fishery in tidal waters may, in an ordinary case, be presumed to be the owner of the soil, as in the case of non-tidal water, yet that a grant of such a fishery does not necessarily import the ownership of the soil.

In *A.-G. v. Emerson*¹ it was held by the House of Lords that though *primâ facie* the Crown is entitled to every part of the foreshore, proof by the lord of an adjoining manor of the ownership of a several fishery over part of it exercised by "kiddles," i.e., a series of stakes fixed in the ground, raises a presumption that the freehold of the soil of that part of the foreshore is in the owner of the several fishery.

In *Lord Advocate v. Young*² the pursuer brought an action to establish his title as against the defenders and the Crown to the foreshore of the sea *ex adverso* land of which he was the proprietor. He claimed a grant of feu made to his ancestor in 1804, which described the property granted as land bounded by the sea, but he did not endeavour to show that the grantor had an express title from the Crown. He, however, endeavoured to establish his right to the foreshore by prescriptive possession following on his own title, and, *inter alia*, adduced evidence to show that his predecessor in 1827 built a retaining wall upon a portion of the foreshore; that he and his predecessors had taken stone and sand from the shore; and that they and their tenants had exclusively carried away the drift sea-ware. The Crown, on the other hand, adduced evidence to show that stones and sand were taken from the shore to build a harbour, and that the villagers had carried away in creels drift sea-ware:—

The House of Lords *held*, affirming the decision of the Court of Session, that, notwithstanding the absence of an express title in the superior, the pursuer had given sufficient proof that he and his predecessors had been in possession of the foreshore in question for the prescriptive period specified in the Scottish Act of 1617, c. 12, and the Act of 37 & 38 Vict. c. 94, by virtue of their heritable infeftments, and that he had consequently a valid right of property in the *solium* of the foreshore, as against the Crown.

"With regard to the relative importance," says Lord Watson,³

¹ (1891) App. Cas. 649; see *post*, Chap. VI.

² (1887) 12 App. Cas. 544.

³ Page 554.

"of taking loose ware and the cutting of tangle, as acts evidencing proprietary right, I can only say that, in my opinion, it depends not so much upon attachment or non-attachment to the foreshore, as upon the beneficial character of the right. I should certainly consider the exclusive taking of a valuable annual supply of loose ware to be at least as emphatic an assertion of his right of property, by one having an express title to the foreshore, as his taking from it a yearly crop of growing tangle of less value. . . . I attach not the slightest weight to the fact that some old women carried off sea-ware in creels, for the purpose of manuring their gardens, which were not upon the lands of Colinswell. The removal of clay and stones from the foreshore, which is proved to have taken place at three several periods, is a very different matter. These were in no proper sense acts of the Crown; but acts of that description, although done without title, tend to derogate from the possession of the riparian proprietor, and if carried far enough will deprive his possession of that exclusive character which is necessary in order to establish a prescriptive right."

All these acts of ownership, therefore, when exercised exclusively, tend to show ownership of the soil. The strength of the claim will, in all cases, depend on the number of exclusive acts exercised by the claimant.¹

Land formed by *alluvion*, or gradual and imperceptible accretion from the sea, and land gained by *dereliction*, or the gradual and imperceptible retreat of the sea, belongs to the owner of the adjoining *terra firma*. Where the increase is sudden or perceptible, the land gained belongs to the Crown.² This question has been carefully considered in the case of *Rex v. Lord Yarborough*; and the judgment of the Court of King's Bench, delivered by Lord Tenterden, C. J., establishes the propositions above stated, and further defines the word "imperceptible" as meaning imperceptible in progress, and not

Property in land formed by *alluvion* and *dereliction*.

¹ Phear, p. 89. As to meaning of "exclusively," see *Lord Advocate v. Young*, and *Hamilton v. A.-G. for Ireland*, *supra*.

² *Rex v. Lord Yarborough*, 2 Bligh, N. S. 162; affirmed by the H. L. in *Gifford v. Lord Yarborough*, 5 Bing. 163, 27 R. R. 292; 2 Blackstone's Com. 261; Callis on Sewers, 482; Roll. Ab. 170; Dy. 326;

Hale de Jure Maris, ch. iv. s. 2; Moore's History of Foreshore, p. 785; Woolrych on Waters, p. 34; *Seehkristo v. East Ind. Company*, 10 Moo. P. C. 140; *Muzummat Imaum Bendi v. Hergotind Ghose*, 4 Moo. Indian App. 405. See also *Abbot of Peterborough's case*; *Abbot of Ramsay's case*; *R. v. Oldacre*, quoted in Moore's History of Foreshore, p. 157.

in result,—that is to say, where the increase cannot be observed as actually going on, though a visible increase is observable every year.¹ The law thus stated would appear to hold good, whether the accretion is caused by natural or artificial causes, provided it does not arise from acts done with a view to the acquisition of the shore.²

Following this case it has been held in *A.-G. v. Reeve*,³ that where the accretion was owing to the erection of piers and harbour and other works constructed on the sea shore under Act of Parliament, and the removal of sand, shingle and ballast by license from the Commissioners of Woods and Forests, and the accretion was perceptible by marks and measures,⁴ the land gained belonged to the Crown and not to the lord of the adjoining manor. Coleridge, C. J., in delivering judgment, after remarking that the rule of law governing the matter has long been established without any material variation in its expression, observes that, “although the same principle governs throughout “with regard to the older authorities, had they been called forth “at a later period, when property became more valuable and “human observation as to its accretion more exact, it is probable “that the expressions used with reference to the gradual increase “of the land or recess of the sea would have been less vague “and general, especially if they had been applied to results in “part produced as they were in the case now before the Court, “by artificial causes.”⁵

Land lost by
encroachment
of the sea.

Where the sea, or an arm of the sea, by gradual and imperceptible progress encroaches on the land of a subject, the land thereby covered belongs to the Crown;⁶ but where land is suddenly overflowed, and any marks remain by which its limit can be recognized, it remains to the original owner, and may be regained by art or industry; or if the sea retire again it is his as before.⁷ It is very doubtful whether any length of time

¹ *Ree v. Lord Yarborough*, 2 Bligh, N. S. 162; *Gifford v. Lord Yarborough*, 5 Bing. 163, 27 R. R. 292. See also *Ford v. Lucy*, 7 H. & N. 151, and *Foster v. Wright*, 4 C. P. D. 438, 49 L. J., C. P. 97, as to rivers, and *post*, pp. 69 *et seq.*

² *A.-G. v. Chambers*, 4 De G. & J. 55. As to this see *Svebkristo v. East Ind. Co.*, 10 Moo. P. C. 159; *Blackpool Pier v. Fylde Union*, 46 L. J., M. C. 189.

³ 1 L. T. R. 675.

⁴ See as to “accretion” in a non-tidal river, perceptible by marks and measures,

Hindson v. Ashby, (1896) 2 Ch. 1, *post*, pp. 69, 73.

⁵ As to mode of procedure in such cases by English information, see *post*, Chap. X.

⁶ *In re Hull and Selby Rail. Co.*, 5 M. & W. 327.

⁷ Blackstone's Com. 262; Hale, c. iv.; Dyer, 326; Vin. Abr. Prerogative, B. a 2; Comyns' Dig. Prerog. D. 62; Callis, 51; see Moore's History of Foreshore, pp. 785—808; *Anon.*, Dyer, 3266.

during which lands are submerged will bar the owner's right to them when the waters have again retired.¹

With regard to islands, where the island is formed by being, Islands.
as it were, torn from the mainland and surrounded by the sea, the land so surrounded continues to be the property of the former owner.² Islands arising in the sea are said by Hale to belong of common right and *primâ facie* to the Crown; but where they arise in a part of the sea, or in an arm of the sea, or creek, or haven, which is the property of a subject, the islands which happen within the precincts of such private property of a subject will belong to the subject according to the limits and extent of such property.³

The rules by which the right to lands gained gradually from the sea belongs to the adjoining owner are thought by Lord Chelmsford⁴ not to depend on the principle "*De minimis non curat lex*," but to be those stated in the case of *The Hull and Selby Rail. Co.*⁵—viz., 1st. That that which cannot be perceived in its progress is taken to be as if it had never existed; and 2nd. The necessity for some such rule of law for the permanent protection and adjustment of property; for it must be borne in mind that the owner of lands does not derive benefit alone, but may suffer loss from the operation of the rule; for if the sea gradually steals upon the land, he loses so much of his property.⁶

The reason for assigning lands gained suddenly from the sea and islands to the Crown is stated by most writers to be, that the king is owner of the soil of the sea, and the universal occupant of what was unclaimed.⁷

The king has probably from the very earliest times had a right as part of the prerogative to defend the realm against the waste of the sea, and to order the construction of defences at the expense severally of those who are to be benefited by them.⁸

Protection
from inroads
of the sea.

¹ *Mussumat Inaum Bendi v. Her-
govind Ghose*, 4 Moo. Ind. App. 405.

² Hale, part 1, ch. vi.; Fleta, lib. 3, c. 2, s. 6; see Angell, *Tide Waters*, 268; Woolrych, 36.

³ Hale, *supra*.

⁴ *A.-G. v. Chambers*, 4 De G. & J. 68. See further as to this question, the elaborate judgment of Lindley, J., in *Foster v. Wright*, 4 C. P. D. 438, and *post*, p. 71.

⁵ *M. & W.* 327.

⁶ See judgment of Lindley, L. J., in *Hindson v. Ashby*, (1896) 2 Ch. 1, *post*,

p. 73, on the question of "accretion" when the boundaries are defined and known.

⁷ See Hale, pp. 17, 36; Callis, 44; 2 Blackstone, 251. But, as Callis says, such islands are not within a county, and so without the realm; *Reg. v. Keyn*, 2 Ex. Div. 63. The king is not universal occupant of unclaimed dry land; *Bristowe v. Cormican*, 3 App. C. 641, per Lord Blackburn.

⁸ Per Coleridge, C. J., in *Hudson v. Tabor*, 2 Q. B. D. 290, 46 L. J., Q. B. 463; 36 L. T. 492; see Woolrych on

Prerogative of
the Crown.

The power to erect a sea-wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public; and no doubt the ordinary rights of property must give way to that which is done for the protection and safety of the public, but only to the extent to which it is necessary that private rights and public rights should be sacrificed for the larger public purposes—the general common weal of the public at large.¹

Commissions
of sewers.

We therefore find in the very earliest records that commissions of sewers were issued by the king for this purpose. The various statutes of sewers, beginning with 6 *Hen. VI. c. 5*,² do but regulate the exercise of the prerogative in this respect, and prescribe forms of commissions for the ordering and execution of the necessary works, which forms have been from time to time varied. In early times, probably, the king ordered the construction of such sea walls as he judged necessary, very much according to his own discretion. In process of time, however, this discretion came to be limited by established rules, and at last by statute. The Statute of Sewers, 23 *Hen. VIII. c. 5*, is the most important of these. By it commissions of sewers were to be issued from time to time as need required,³ and their powers and duties were confined to the particular districts issued in each particular commission, which formerly only lasted for three years. But now, by 24 & 25 *Vict. c. 133*, a commission of sewers once issued shall be deemed to continue until such time as it shall be superseded by his Majesty, who may from time to time fill up any vacancies therein under his sign manual.

Powers and
duties of
Commis-
sioners of
Sewers.

The Commissioners of Sewers were required by 23 *Hen. VIII. c. 5*, in the first place, to make a survey of the various defences against the sea, and obstructions to navigation or the flow of rivers, and to hear and determine concerning the same, through whose default such defences were out of repair, or such obstruction caused, and to ascertain the names of the owners of the various lands where offences have occurred, and also of such as have suffered inconvenience. They were empowered to assess

Sewers, pt. 1, p. 42; Callis on Sewers, p. 80; see also per Lord Coke, 10 Coke, 143; see also per Lord Holt, 12 Mod. 321; Holt's Cases, 643.

¹ *Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397, 23

L. T. 121.

² The most important are—23 *Hen. VIII. c. 5*; 13 *Eliz. c. 9*; 3 & 4 *Will. IV. c. 22*; 24 & 25 *Vict. c. 133*. See also *post*, Chap. VII.

³ See Woolrych on Sewers, pp. 8, 9.

the lands of all individuals in their district, whether damaged or not, for repairs which they are directed to execute, and to take labourers, carriages, timber, and other necessities, on paying a reasonable price. They are empowered to make such orders, ordinances, and decrees as may be expedient, and by the judicial authority with which they are invested they may sit in judgment upon their own orders, subject, however, to the correction of the higher Courts. They may issue writs and precepts to the sheriffs, bailiffs, and others, and may punish by distress, fine, and, in some cases, by imprisonment, any one showing negligence or disobeying their orders.¹ Their powers are confined to the sea, and to navigable rivers, and to public sewers, and to things which interfere with the public convenience.²

The authority to be exercised by the Commissioners of Sewers on the behalf of the public, does not, however, vest in them such a property in the embankments or walls which they have erected, as will enable them to maintain an action of trespass against a trespasser for breaking them down—the remedy must be by indictment in the name of the king.³ Sect. 10 of the Sewers Act, 1833 (3 & 4 Will. IV. c. 22), by which all walls, banks, &c., adjoining the sea or tidal rivers are to be within the jurisdiction of the commissioners, does not vest such walls, &c., in the commissioners until they have taken them within their jurisdiction in the manner described in sect. 47.⁴ It has further been held that there is nothing inconsistent with the purposes of a sea or river wall or embankment erected to protect the neighbouring lands, in a public right of way along the surface; and that the same evidence of user will raise the presumption of a dedication of a right of way by the owner of the soil in the case of such embankment, as in any other case of uninterrupted and open user by the public; but that, if it was necessary for public purposes or for the public safety of a district that the level of the wall should be altered, so as to interfere with and obstruct the public right of way, the right of way must yield to the larger and more important purpose for which the powers of the Commissioners of Sewers were given.⁵

Property in embankments or walls erected not vested in them.

The navigable rivers, ports, harbours and docks of the kingdom

Their powers limited to

¹ Woolrych on Sewers, pp. 54—62.

² Ibid. p. 68; per Buller, J., in *Jean v. Holland*, 2 T. R. 365.

³ *Duke of Newcastle v. Clark*, 2 Moore, R. 666; 20 R. R. 583; see *Driver v. Simpson*, Ibid. note on p. 682.

⁴ *West Norfolk Farmers' Manure Co. v. Archdale*, 16 Q. B. D. 754; 55 L. J., Q. B. 230; 54 L. T. 561.

⁵ *Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397.

parts of the coast not vested in any conservators or harbour trustees.

Liability to repair not enforceable against the Crown or at common law against a frontager.

But the Crown may prevent destruction of natural barriers.

A.-G. v. Tomline.

are now almost universally vested in corporate bodies of conservators, who have all the powers of permanent Commissioners of Sewers, unless there is stipulation to the contrary in their particular Act.¹ The powers, therefore, of Commissioners of Sewers at the present day are restricted to those parts of the coast not under the regulation of any body of conservators or trustees of ports, harbours or docks.

Though it has been said that it was the duty of the king to guard and protect the shores and lands adjoining the sea from being overflowed by the sea, there is no liability in this respect which can be enforced against the king, and no mode of enforcing it.² There is also no liability at common law apart from prescription upon a frontager to maintain a sea-wall for the protection of his neighbours; nor is the fact that a frontager had always maintained a wall in front of his land, and that no one had thought it necessary to erect a wall to protect his land from the water which might come from his neighbour's land, sufficient evidence to establish a prescriptive liability on a frontager to maintain the wall for the protection of the adjoining landowners.³ So a parish has been held not liable to repair part of a highway washed away by the sea.⁴

But there exists in the Crown a prerogative right and a duty to protect the lands of the realm from the inroads of the sea for the benefit of the commonwealth; and such prerogative right and duty import a right in an owner of land protected from the sea by a natural barrier to have such barrier preserved from destruction by the owner of the land on which it exists; and this right, though not enforceable against the Crown, is enforceable against a subject who is the owner of land on which such natural barrier exists. Thus in *A.-G. v. Tomline*,⁵ the plaintiff and relator, the Secretary of State for War, was seised in trust for the Crown of a piece of land near the shore of the estuary of a tidal river. The defendant was lord of the manor and owner of the adjoining land and foreshore lying between the plaintiff's land and the estuary. On the shore on the defendant's land was a natural bank of shingle formed by the sea. The defendant and his predecessors had for many years sold large quantities of

¹ Woolrych on Sewers, p. 49.

² *Hudson v. Tabor*, 2 Q. B. D. 290; *A.-G. v. Tomline*, 14 Ch. D. 58; 12 Ch. D. 214. As to liability of River Commissioners under Acts of Parliament to repair, see *Bramlett v. Tees Conservancy*,

post, ch. vii.

³ *Hudson v. Tabor*; *A.-G. v. Tomline*, supra.

⁴ *Reg. v. Hornsea*, 2 C. L. R. 596; 23 L. J., M. C. 59; 6 Cox, C. C. 279.

⁵ 12 Ch. D. 214; 40 L. T., N. S. 775.

shingle, and in consequence of this removal the plaintiff's property was overflowed by a very high tide in 1877, and its safety became endangered. On information and action to restrain defendant from removing any shingle so as to endanger the plaintiff's land, Fry, J., granted the injunction prayed, and based his judgment on the ground of the duty of the Crown to protect the land of the subject, and on the absurdity which would result if the subject was allowed to destroy what the Crown is bound to maintain; and, remarking on the case of *Hudson v. Tabor*, he admits that a great distinction may exist between a liability to repair an artificial bank or wall, and the right to destroy a natural protection. This judgment was affirmed on appeal,¹ the Court holding that it is the duty of the Crown to protect the realm from the inroads of the sea by maintaining the natural barriers or by raising artificial barriers, and that no subject is entitled to destroy a natural barrier against the sea; and if the destruction of such natural barrier would cause an injury to a neighbouring landowner, he is entitled to an injunction to restrain it, although the removal of shingle and its sale is a natural and ordinary user of the land.²

By prescription, however, the liability to repair a sea-wall and to defray all the expenses may be imposed upon an individual owner. If the injury to a sea-wall is occasioned by the default of him who is bound to repair it and is not irremediable, and he cannot repair it, every one charged with the repairs may have an action on the case against him.³ Thus it has been held in *Lyme Regis Corporation v. Henley*⁴ that an individual who had suffered loss by decay of sea-walls which a corporation was directed to repair under terms of a grant from the Crown conveying borough and pier or quay tolls, may sue the corporation for damages; so also, as the obligation concerns the public, an indictment will lie. Where a farm has been subject *ratione tenuræ* to the repair of a sea-wall, such liability attaches to every part of the land comprising the farm though the farm has been sold and has become vested in several different purchasers.⁵ If the injury is caused by a sudden tempest without any default on his part, then the Commissioners of Sewers may order a new one, even in a different

Liability to repair may be imposed by prescription.

¹ 14 Ch. D. 58.

² See *Crompton v. Lea*, 31 L. T., N. S.

469.

³ *Keighley's case*, 10 Coke, 139.

⁴ 3 B. & A. 77; 5 Bing. 71; affirmed

1 Scott, 29; 1 Bing., N. C. 222; 2 Cl. & F. 331; 8 Bligh, N. S. 690; 37 R. R. 125.

⁵ *L. and N. W. Ry. v. Fubbing Level Commissioners*, 66 L. J., Q. B. 127; 75 L. T. 629; but see *post*, p. 38.

form if necessary, to be erected at the expense of all the owners of land who would be damaged by the nuisance, or may be benefited by the repair, according to the quantity of their lands.¹ At common law the king might issue commissions to repair ancient walls, but not to build new ones. If a man would make a new wall, he must sue an *ad quod damnum* to know what damage it shall be to the king and others. By stat. 23 *Hen. VIII. c. 5*, new inventions are not warranted, but some alterations might be made; when an old wall by violence of the sea is broken down, another wall in the case of inevitable necessity may be made, but if the damage may be avoided by the reparation of the old one, a new one ought not to be erected.²

Where
damage is
caused by
extraordinary
tempest.

In the absence of evidence that the prescriptive liability of a frontager extends to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused falls on all the landowners in a level.³

The landowners of a level cannot, however, be called upon to contribute to the repairs of a sea-wall, although it has been injured by an extraordinarily high tide and tempest, unless the damage has been sustained without the default of the party generally bound to repair.⁴ A landowner may, moreover, be bound by prescription to repair a sea-wall, even though it be destroyed by an extraordinary tempest, and it is a question for the jury whether he is bound to provide against the effects of ordinary tempests only or of extraordinary ones also.⁵

Negligence.

Where an obligation is imposed on a frontager, either at common law or by statute, to keep a wall at a certain height, and he fails to do so, he is guilty of negligence and responsible for all damage caused by such negligence, even though the damage is caused by the overflow of an extraordinarily high tide. Thus, in *The Nitro-Phosphate Co. v. London Docks*,⁶ the defendants, the owners of a dock on the river Thames, were, prior to 1875, required by the Dagenham and Havering Commissioners of Sewers to maintain a river-wall in front of their land at a height of four feet two inches above Trinity high water mark. They were authorized by Act of Parliament to make and maintain a dock

*Nitro-Phos-
phate Co. v.
London
Docks.*

¹ *R. v. Commissioners of Sewers for Somerset*, 8 T. R. 312; 4 R. R. 659; *Keighley's case*, 10 Coke, 139.

² *Isle of Ely case*, 10 Coke, 140; *Rooke's case*, 5 Coke, 99.

³ *Fobbing Sewers Commissioners v. Reg.*, 11 App. Cas. 449; 56 L. J., M. C. 1; 55 L. T. 498.

⁴ *R. v. Commissioners of Sewers for Essex*, 1 B. & C. 477; 25 R. R. 467.

⁵ *R. v. Leigh*, 10 A. & E. 398; 50 R. R. 463; and see per Cairns, L. C., in *River Wear Commissioners v. Adamson*, 2 App. C. 750.

⁶ 9 Ch. Div. 503; 37 L. T., N. S. 330.

and works according to levels defined in plans and sections deposited with the clerk of the peace. The sections showed the retaining banks of the new works to be of a uniform height of four feet above Trinity high water mark. The defendants allowed their retaining bank to be at one point several inches below the level of four feet. In November, 1875, an extraordinarily high tide, which rose to four feet five inches above Trinity high water mark, overflowed the defendants' bank and damaged the plaintiffs', adjoining landowners. The tide had never been known to rise so high before. In an action for damages the defendants urged that they were not liable, as the extraordinarily high tide was the act of God, and that, even if they were liable for some damages for not keeping the wall of the height of four feet, they were not liable for the whole damage caused by a tide which rose to four feet five inches, which would have overflowed the plaintiffs' premises, even if they, the defendants, had maintained their wall at the proper height. Fry, J., held, that a duty was imposed on the defendants by the Act of Parliament to keep their wall at a uniform height of four feet above Trinity high water mark; that they had failed to do so, and were guilty of negligence, and liable for the whole of the damage; and that though the unprecedented high tide might be the act of God, yet no man who has a duty cast on him, and who does not perform it, can rely upon the act of God as any excuse at all. He held further, that as he could not tell whether any of the damage did accrue from the act of God, and could not analyze the total amount of damage between the defendants' negligence and the act of God, the defendants must pay the whole damage done.¹

On appeal² the Lords Justices affirmed the decree of Fry, J., with a variation. They held, that, independently of the Act of Parliament, the defendants were bound at common law to maintain their bank up to the level of four feet two inches, the height of the rest of the river wall, and were liable to the plaintiffs for negligence in not doing so; that the extraordinarily high tide in question, though the act of God, did not excuse the defendants from their liability, but that they ought to have an opportunity of showing that the damage done by the act of God and the damage occasioned by their negligence could be ascertained and apportioned.³

¹ *Nitro-Phosphate Co. v. London Docks*, 37 L. T., N. S. 330.

² 9 Ch. D. 921; 39 L. T. 453.

³ As to the "act of God," see *River*

Wear Commissioners v. Adamson, L. R., 2 App. C. 780; 47 L. J., Q. B. 193; 37 L. T. 543; *Nicholls v. Marsland*, 2 Ex. Div. 1; and *post*, Chap. III.

Liability of
tenants for
life and
mortgagees.

If a tenant for life suffer a sea-wall to be out of repair, so that by his fault the land is drowned, it is waste in him; but if the land be drowned by the rage and extraordinary violence of the sea, it is not waste.¹ A mortgagee not in actual possession, but in receipt of rents and profits of land charged with the repair of a sea-bank, is liable for default of reparation, although notice has not been given him to repair under 3 & 4 Will. IV. c. 22, s. 15, as the power given by the old statute 23 Hen. VIII. c. 5, to assess and impose fines and pecuniary impositions still exists, although the statute 3 & 4 Will. IV. c. 22, s. 15, enacts that after notice given the commissioners may in default repair themselves at the defaulter's expense.²

Presentment
by a jury
necessary.

According to the terms of the commissioners set out in 23 Hen. VIII. c. 5, s. 3, before an order can be made upon a person to repair a sea-wall, there must be a presentment by a jury that he is the person by whose default the sea-wall is out of repair.³ Stat. 3 & 4 Will. IV. c. 22, to a certain extent modifies that enactment, because, whereas under the old statute it was necessary that the jury should find on each occasion who was liable to do repairs, the later statute enacts that it shall no longer be necessary during the continuance of the same commission to have a presentment of a jury upon subsequent wants of repair, and that the first presentment of any given individual, or body politic, shall be sufficient. It says that not only an individual once presented, but the owners and occupiers for the time being of such lands, shall continue liable from time to time to repair the defence according to the presentment. But when it empowers the commissioners to make their order it only mentions such person, body politic or corporate, *i.e.*, the person or body politic originally presented. It was held, therefore, that an order on an owner to whom the land had been transferred since the presentment was bad.⁴

The commissioners may proceed to order repairs under a commission and presentment of a jury on their own view (or by survey—that is, upon their own view)—or assisted by measurement and by conference with competent persons, whom they may

¹ *Griffith's case*, Moore, Rep. 62.

² *Reg. v. Baker*, L. R., 2 Q. B. 621; 36 L. J., Q. B. 242.

³ *Wingate v. Waite*, 6 M. & W. 739; *Reg. v. Wharton*, 2 B. & S. 719; 9 Jur., N. S. 325.

⁴ *Reg. v. Wharton*, 2 B. & S. 719. As to liability on purchasers after sale of lands, see *L. and N. W. Ry. v. Fobbing Level Commissioners*, 66 L. J., Q. B. 12; 75 L. T. 629.

call in, or by view and survey combined, or possibly on the report of a surveyor appointed for the purpose; but the information of a marsh bailiff and the expeditor and another seems not sufficient to justify an order to repair.¹ A mandamus is unnecessary to enable Commissioners of Sewers to enforce liability on persons liable *ratione tenuræ*.²

In the absence of any prescriptive liability on any individual, all the owners and occupiers benefited by the wall, and they alone, are liable to be rated to its repair.³ Where five owners of lands below the sea level covenanted with each other that a certain sea-wall should be repaired at the expense of the estates to be borne rateably, a purchaser of one part of the estate who had no actual notice of the covenant was held liable to contribute to its maintenance on the following grounds:—1st. The covenant ran with the land; 2nd. The defendant was bound to inquire how the wall was kept up, as it was manifest that the land, when he bought it, was protected by the sea-wall in question; 3rd. That as defendant was protected by the sea-wall, he was liable at common law to contribute to its support, unless he could prove he was not so liable.⁴

In absence of prescription all owners and occupiers benefited liable to be rated for repairs.

All owners of land exposed to the inroads of the sea, or Commissioners of Sewers acting for a number of landowners, have a right to erect such works as are necessary for their own protection even although they may be prejudicial to others, and they will not be liable to pay compensation for injury to lands not within the level, in the absence of negligence or malice.⁵ It does not appear that the Court in the last-cited case meant to lay down the principle that a riparian owner has a right as against the Crown to erect defences against the sea on the shore below low water mark when the shore is the property of the Crown, and so to justify a *purpresture*; this right would seem confined to the soil above high water mark, which is *primâ facie* his own. The question did not arise in the case, as the works were executed by

Necessary defences may be erected though injurious to adjoining owners.

¹ *Reg. v. Wharton*, 2 B. & S. 719, per Cockburn, C. J., and Crompton, J.; Callis, p. 107.

² *Reg. v. Gamble*, 3 P. & D. 122; 11 A. & E. 69; 9 L. J., Q. B. 2.

³ *Keighley's case*, 10 Coke, 130; *Isle of Ely case*, 10 Coke, 140; *Rooke's case*, 5 Coke, 99. In *Rex v. Inhabitants of Pant*, 2 Moo. & Rob. 307, it was held, at *nisi prius*, by Maule, J., that a parish cannot be indicted for not rebuilding a sea-wall over which an alleged highway

used to pass; for it could not be said to have been at the time of the default a highway which the public were prevented from using for want of reparation.

⁴ *Morland v. Cooke*, L. R., 6 Eq. 252; 37 L. J. Ch. 852; 18 L. T. 496.

⁵ *R. v. Commissioners of Sewers of Pugham Level*, 8 B. & C. 355; 32 R. R. 406. This would not seem to hold good in tidal rivers; see *A.-G. v. Lonsdale*, L. R., 7 Eq. 387; 38 L. J. Ch. 335; 20 L. T. 64; *post*, p. 154.

the Commissioners of Sewers, and the action was by an adjoining landowner for damage done to his land by the works.

Public right
of navigation.

The ownership of the Crown in the soil of the shore is subservient to the public right of navigation, and cannot be used in any way so as to derogate from and interfere with such right. The grantees of the Crown take subject to this right, and any grant to a subject so as to be detrimental to the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right.¹ All such nuisances may be abated on information.² The right of navigation extends over every part of a navigable river, and *à fortiori* of the sea,³ and includes the right to anchor and fix moorings without paying toll as a necessary part of the right which is essential for its full enjoyment.⁴

Right of pas-
sage over the
shore.

This right of passage has been said not to extend to the right of crossing the shore at low water, for the purpose of landing goods, or fishing, where the shore is the property of a subject, in the absence of necessity or of a prescriptive right to do so;⁵ but this doctrine is not now supported by the Courts, and decisions have been given in modern cases which overrule it. Thus it has been held that the right of navigation includes all such rights as are necessary for the full enjoyment, not only of the right of passage,⁶ but of the rights of trade and commerce;⁷ and that the private property of the Crown and its grantees is in every way subservient to this public right.⁸ Thus in the case of *A.-G. v. Wemyss*⁹ the Judicial Committee have laid down, on appeal from the Courts of the Straits Settlements, that the right of the proprietor in the foreshore is subject to the obligation of allowing the owner or occupier of lands adjoining the sea free access and egress to and from

¹ *A.-G. v. Parmeter*, 10 Price, 378, 412; 24 R. R. 723—745; *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192; *A.-G. v. Burridge*, 10 Price, 350; 24 R. R. 705.

² *A.-G. v. Richards*, 2 Anst. 603; 3 R. R. 632.

³ *R. v. Ward*, 4 Atk. 384.

⁴ *Gunn v. Free Fishers of Whitstable*, 11 H. L. 208; *A.-G. v. Wright*, (1897) 2 Q. B. 318.

⁵ *Blundell v. Cuttrel*, 5 B. & Ad. 268; 24 R. R. 353. The sea shore is not a "street, highway or public place" within the Gas and Waterworks Clauses Act, 1847: *Maddock v. Wallasey Local Board*,

55 L. J., Q. B. 267; 50 J. P. 404.

⁶ *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192; *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁷ *Rez v. Russell*, 6 B. & C. 566; 30 R. R. 432; *Original Hartlepool Colliers v. Gibb*, 5 Ch. D. 713; 46 L. J., Ch. 311; 36 L. T. 433.

⁸ *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192; *A.-G. v. Parmeter*, 10 Price, 378; 24 R. R. 723—745; *A.-G. v. Burridge*, 10 Price, 350; 24 R. R. 705; *A.-G. v. Johnson*, 2 Wils. 87; 18 R. R. 156.

⁹ 3 App. Cas. 192, P. C.; see also *North Shore Ry. v. Pion*, 14 App. Cas. 612, *post*, p. 95.

the sea to his lands, and to beach, land, and haul up boats upon the shore. In the case of *The Mayor of Colchester v. Brooke*,¹ it was held that the right of passage in a river exists at all times and states of the tide, and that it is no excess of this right if a vessel, which cannot reach its destination at a single tide, remains aground till the tide serves. Lord Denman, C. J., delivering the judgment of the Court of Queen's Bench, says: "Now if, in such rivers (*i.e.*, navigable tidal rivers), it was held "that the character (*i.e.*, of being public and navigable in the "sense of a highway) did not extend higher up than the water "sufficed to float vessels at all times, or was suspended during "such periods of the tide as left the channel too shallow for "that purpose, rights of the public invaluable and immemorial "in numerous rivers would be abridged and rendered in many "particulars vexatiously uncertain, and in many cases be made "nearly, if not entirely, useless. . . . To say, then, that the "river ceased to be navigable, ceased to be a highway, at the ebb "or other states of the tide when such vessels could not float, is "in effect to say, that except for a short period of every month, "they should not use the river at all for the purpose of trading "with Colchester. It is more reasonable to hold that the term "navigable is a relative and comprehensive term, containing within "it all such rights upon the waterway as, with relation to the "circumstances, are necessary for the full and convenient passage "of vessels and boats along the channel. . . . The right of soil "in arms of the sea and public navigable rivers, which the Crown "*prima facie* has, independently of any ownership in the adjoining lands, must be, in all cases, considered as subject to the "public right of passage, however acquired; and any grantee of "the Crown must of course take subject to such right."

Mayor of Colchester v. Brooke.

In the case of *Marshall v. Ulleswater Company*,² it was held that persons having a right to navigate on a non-tidal lake were entitled to pass over a pier belonging to the plaintiff, the owner of the soil of the bed of the lake, which had been wrongfully erected by a third party, but was maintained by the plaintiff, and which prevented persons having a right of access from coming down to the brink of the lake, for the purposes of going on it to exercise the public right of navigation. In delivering the judgment of the Court, Blackburn, J., says: "It

Marshall v. Ulleswater Company.

¹ 7 Q. B. 373; 15 L. J., Q. B. 59.

² L. R., 7 Q. B. 166; 41 L. J., Q. B. 413; 25 L. T. 793.

“ is well-established law, that where there is a public highway, “ the owners of land have a right to go upon the highway “ from any spot on their own land. They cannot, of course, “ pass over the soil of another without his leave, and he who “ has dedicated the road to the public at large has no right to “ complain that a particular individual has come upon it at one “ spot, rather than at another ; consequently every person in “ the vicinity of Ulleswater, whose land abuts on the edge of “ the lake, has a right to come down to the brink of the water “ for the purpose of going upon it to exercise the public right of “ navigation where it is admitted to exist. Now I apprehend “ that where there is a right of that kind, the necessary inci- “ dents are involved in it, and therefore, that in a navigable “ river like the Thames, where a person with his barge has come “ to the land, it is not essential that he shall find some spot “ where the water is so deep that the barge can float up to the “ bank close enough to enable him to step ashore, but that he has “ the reasonable and usual modes of disembarking incidental to “ the navigation of vessels ; if the water were a few feet in depth “ he would probably use a boat, if very shallow he could wade, or “ if his vessel lay conveniently near, he might place a plank across “ it to the land ; and, therefore, the rule of law is that the owner “ of the adjoining land, or those whom he permits to go thereon, “ have a right of access to and from their vessels either by walking, “ or wading, or walking over a plank, but that they have no right “ to disturb the soil covered with water, as by permanently fixing “ anchors.”¹ This right of crossing the sea shore as incident to the public right of navigation gives no right to trespass on land above high water mark, and there is no legal right for fishermen (apart from exceptional circumstances, such as stress of weather) to draw or to leave their boats above that line.² Such a right may, however, be acquired by prescription, as it has been held that where fishermen had immemorially been used to beach their boats upon land near the sea, and the owner of such land had obtained an Act authorizing him to levy a yearly sum for such boats beached, the owner could not exclude the fishermen without assigning to them other land equally suited for beaching boats.³

¹ L. R., 7 Q. B. 172. See also *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662 ; *North Shore Rly. v. Pion.*, 14 App. Cas. 612 ; *South Eastern Rail. Co. v. Dorling*, 5 C. B., N. S. 821 ; *A.-G. v. Conservators of the Thames*, 1 Hem. & M. p. 32, per

Wood, V.-C.

² *Ilchester v. Rashleigh*, (1889) 5 T. L. R. 739 ; 61 L. T. 477 ; 33 W. R. 104.

³ *Aiton v. Stephen*, 1 App. Cas. 456, H. L. Sc.

The right of fishing in the sea and upon the shore between high and low water mark is *prima facie* vested in all the subjects of the realm as a common right.¹

Public right
of fishery.

But in some cases statute law has set bounds to the exercise of this right in respect of seasons, particular kinds of fish, and the manner of fishing.

The right of the public to fish includes the right to take shell fish on the sea shore between high and low water mark.² It seems doubtful whether it includes the taking of shells.³ It may be carried on by the use of lawful nets.³ This right is subservient to the right of navigation,⁴ and has been held not to include a right for fishermen apart from exceptional circumstances, such as stress of weather, to draw up or leave their boats above high water mark.⁵

Prior to *Magna Charta* the Crown had power to exclude the public from this right, and to grant a several and exclusive right of fishing to individual subjects. This right cannot now be granted by the Crown, and a several fishery in the sea can now only be claimed by prescription, or ancient usage presupposing a grant, or by express grant from the Crown prior to *Magna Charta*.⁶ Where an immemorial usage is proved, a lawful origin for the usage ought to be presumed where reasonably possible.⁷ The right of several fishery is independent of the ownership of the soil of the shore by the subject, and may exist either with or without such ownership. A grant, therefore, of the shore alone will not of itself pass the fishery, which will remain in the public;⁸ nor will a grant of a several fishery necessarily pass the soil,⁹ though it is evidence, coupled with the grant of a manor, that the soil was intended to pass.¹⁰

¹ *Fitzwalter's case*, 1 Mod. 105; *Anonymous*, 6 Mod. 73; *Warren v. Matthews*, 1 Salk. 357; 6 Mod. 73; *Smith v. Kemp*, 2 Salk. 637; *Ward v. Creswell*, Willes, 265; *Bagot v. Orr*, 2 Bos. & Pul. 472; 5 R. R. 668; *Carter v. Murcott*, 4 Burr. 2163; *Mayor of Orford v. Richardson*, 4 T. R. 437; 3 R. R. 579.

² *Bagot v. Orr*, 2 Bos. & Pul. 472; 5 R. R. 668. See as to oyster fishery *Goodman v. Saltash Corporation*, 7 App. Cas. 633.

³ *Warren v. Matthews*, 6 Mod. 73; 1 Salk. 357.

⁴ *A.-G. v. Parmeter*, 10 Price, 378; 24 R. R. 723—745; *A.-G. v. Johnson*, 2 Wils. 87; 18 R. R. 156.

⁵ *Ilchester v. Rashleigh*, 5 T. L. R. 739.

⁶ *Carter v. Murcott*, 4 Burr. 2163; Hale, ch. 5; *Warren v. Matthews*, 1 Salk. 357; *Malcolmon v. O'Dea*, 10 H. L. 593; *Allen v. Donnelly*, 5 Ir. C. L. R. 292; *O'Neill v. Allen*, 9 Ir. C. L. R. 132; Kent's Com. 489; Moore's History of the Foreshore, 715; Woolrych on Waters, c. 5, p. 75.

⁷ *Goodman v. Saltash Corporation*, 7 App. Cas. 633.

⁸ Per Hale, C. J., *Fitzwalter's case*, 1 Mod. 105.

⁹ *A.-G. v. Emerson*, (1891) App. Cas. 649; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 29 R. R. 449.

¹⁰ For a full account of the right of fishery and the incidents thereto, see *post*, Chap. VI.

Wreck.

By general law all goods found afloat and derelict belong to the king in his office of Lord High Admiral.¹ The right to take wreck is not claimed by the Crown as part of or appurtenant to the ownership of the sea shore, but in virtue of the royal prerogative.² The right to take wreck on the shore may be granted to a subject apart from the shore itself, but it frequently exists as a franchise attached to a manor on the sea coast, though in such cases it is still prescribed for on the ground of immemorial usage or proved by express grant.³

A grant of the shore alone does not, therefore, pass the right of wreck, nor does a grant of wreck alone pass the shore, though it may be called in as evidence in support of a claim to the shore.⁴ The right to wreck will not pass by the general words of a grant.⁵ Wreck appurtenant to a manor by prescription does not pass under a grant of the office of admiral with wreck and profits appertaining to the office, though the manor is in the king's hands at date of the grant.⁶ The right to take wreck implies a right of crossing the shore for the purpose of taking it.⁷

What is wreck.

By the stat. of *West. I. c. 4*, it is provided that no ship or anything in it shall be adjudged wreck where any man or domestic animal escape alive.⁸ In such cases the goods are to be saved and kept by the coroner, sheriff, or king's bailiff: the owner may claim them within a year and a day: if he does not so claim them, they are to be delivered to the officers of the Crown.⁹ Where goods are perishable, they may be sold sooner, to prevent loss.¹⁰ Where wreck belongs to another than the king, he is to have them in the same way. *Flotsam*,¹¹ *jetsam*,¹² and *ligan*¹³ being on the land pass by grant of wreck, but this only when the ship perishes, or the owner of goods is not known; and goods cast into the sea for fear of tempest are not forfeited unless the ship be lost.¹⁴

¹ *Rex v. 49 Casks of Brandy*, 3 Hagg. 270; *The Rebeckah*, 1 C. Rob. 227; *A.-G. v. Emerson*, (1891) App. Cas. 649.

² Moore's History of Foreshore, 713; Bracton, 2; Vent. 188; 5 Coke, 108; *Sutton v. Buck*, 2 Taunt. 355; 11 R. R. 585.

³ See *Talbot v. Lewis*, 6 C. & P. 606.

⁴ As to this, see *Dickens v. Shaw*, Moore's History of Foreshore, 3rd ed. 454, 889, and cases *ante*, p. 24.

⁵ *Alcock v. Cooke*, 2 M. & P. 625; 30 R. R. 625.

⁶ *Wiggin v. Branthwaite*, 1 Ld. Raymond, 473; Holt, 758; 12 Mod. 259.

⁷ 6 Mod. 149, *Anon.*

⁸ See *Hamilton v. Davies*, 5 Burr. 2732.

⁹ Woolrych, 12; Phcar, 99; see *Sutton v. Buck*, 2 Taunt. 302; 11 R. R. 585.

¹⁰ 2 Inst. 168.

¹¹ When the ship sinks and goods float. (5 Coke, 106.)

¹² Where the goods are thrown overboard to lighten the ship and the ship perishes. (*Ibid.*)

¹³ Heavy goods cast in the sea and buoyed up by corks. (*Ibid.*)

¹⁴ 46 Edw. III. c. 15.

Further, to constitute wreck of the sea which will pass by grant to a subject, not only must there be no life saved, and no vestige remaining by which the property can be identified, but the goods must be cast or left on land by the sea,¹ touching the ground,² though they need not have been left dry.¹

A log of wood floating in the sea near the shore, and drawn on a rock by a person wading, and another log which having been cast on the beach and marked by the grantee of wreck, and then carried out to sea again and taken the second time while floating, were both held in a late case to be *droits* of the Admiralty, and not to belong to the grantee of wreck on the coast.³ The grantee of wreck has, however, a special property in all goods stranded in his liberty, and may maintain trespass against a wrongdoer for taking them away, though such goods were part of a cargo of a ship from which some persons had escaped alive, and though the owners within the prescribed time identified them, and before any seizure had been made by the grantee.⁴

To constitute wreck under the *Merchant Shipping Act*, 17 & 18 Vict. c. 104, and to entitle the finders to salvage, the goods must have been to sea in a ship; and timber which had drifted from the place where it had been moored is not wreck within the Act.⁵ This Act is repealed by sect. 745 and schedule 22 of 57 & 58 Vict. c. 60 (the *Merchant Shipping Act*, 1894), but the definition of wreck given in sect. 2 of the earlier Act is re-enacted by sect. 510 of the later Act. The goods must also have been wrecked—*i.e.*, cast on the shore, for goods landed from a ship which was abandoned and driven on shore are not wreck within 3 & 4 Will. IV. c. 52, s. 50, so as to be liable to pay under that statute.⁶

It has been held that between high and low water mark when the tide is high the Court of Admiralty has jurisdiction over wreck, and when it is low the Courts of Common Law; Sir J. Nicholls thus stating the law: "Above high water mark "it [wreck] belongs to the lord of the manor as grantee of the "Crown; beyond low water mark he can have no claim; it is on "the high seas, and belongs to the Admiralty. It is equally clear "that between high and low water mark it is *divisum imperium*;

Jurisdiction
of Courts of
Admiralty
and Common
Law.

¹ *Rees v. 49 Casks of Brandy*, 3 Hagg. 257; 1 Hen. IV. c. 16; *The Rebeckah*, 1 C. Rob. 227.

² *The Pauline*, 2 Rob. Adm. 358.

³ *Stackpole v. The Queen*, 1 R. R., 9 Eq. 119.

⁴ *Baillif of Dunwich v. Sterry*, 1

B. & A. 831; 35 R. R. 471.

⁵ *Palmer v. Rouse*, 3 H. & N. 505.

⁶ *Legge v. Boyd*, 1 C. B. 92; see *Clark v. Chamberlain*, 2 M. & W. 78. As to customs duty, see *Barry v. Arnaud*, 10 A. & E. 646; 50 R. R. 516.

“when the tide covers this space it is sea, when it recedes again it is land, and within the jurisdiction of the manor.”¹

Spanish dollars one hundred years old found on the shore must be presumed to have come from a vessel which had been wrecked, though no part of the vessel is found.²

Royal fish.

Royal fish—*i.e.*, whale, sturgeon and porpoise—whether thrown on the shore or caught on the sea within the realm, are the property of the Crown and not of the finder. They may be the property of a subject by grant or prescription in the same way as wreck.³

Bathing.

Bathing in the open sea and in tidal rivers has been held by the Court of King's Bench, by a divided opinion, not to be a common law right, so as to justify the public in passing over those parts of the shore which are private property, in order to gain access to the water for that purpose.⁴ The plaintiff in this case was lord of the manor and owner of the shore by grant from the Crown, on the river Mersey, an arm of the sea, and had also the exclusive right of fishing on the shore with stake nets. The defendant was servant of an innkeeper on the shore, who kept bathing machines, and he drove the machines across the shore to the water. No prescriptive right was claimed for the passage of machines, though it was proved to be the custom for people to pass on foot for the purpose of bathing. The defendant claimed a common law right for all the king's subjects to bathe in the sea, and to cross the shore for that purpose on foot, and with horses and carriages. Best, J., took the defendant's view of the case, on the broad ground of the sea being the great highway of the world, of the importance of a free access to the sea, and of a necessity of a right to bathe in the sea as essential to the health of so many persons; but the majority of the Court, Abbott, C. J., Holroyd and Bayley, JJ., held that there was no such common law right, and that in the absence of prescription the plaintiff was entitled to recover for the trespass.⁵ This decision is protested against by Mr. Hall, in his

¹ *R. v. Two Casks of Tallow*, 2 Hagg. 294; *The Pauline*, 2 Rob. Ad. 358; see however *Embleton v. Brown*, 3 E. & E. 234; and *Reg. v. Musson*, 3 E. & B. 800, as to criminal jurisdiction, and 31 & 32 Vict. c. 122.

² *Talbot v. Lewis*, 6 C. & P. 630.

³ Moore's History of Foreshore, 3rd

ed. 753; Stephen's Blackstone, vol. ii. p. 540, 7th ed. See Paterson's Fishery Laws, 24, 165; Woolrych on Waters, 83.

⁴ *Blundell v. Catteral*, 5 B. & Ad. 268; 24 R. R. 353. See *Ilchester v. Ashleigh*, 5 T. L. R. 739; 61 L. T. 477.

⁵ See Angell on Tidal Waters, 28.

Essay on the *Sea Shore*, on the ground that the custom of bathing is as ancient and general a custom as that of fishing in the sea; and that, therefore, the rights of private property should be subservient to this public right, in the same way as they are to the right of fishing.¹

Following the case of *Blundell v. Catteral*, it has been held in *Llandudno Urban District Council v. Woods*² that a clergyman has no right to hold services on the sea shore between high and low water mark, and a declaration to that effect was made on the application of the plaintiffs, lessees of the Crown, though an injunction was refused on the ground that the matter was too trivial. Cozens-Hardy, J., in delivering judgment, says, at p. 208 of the report: "I think I am bound by the decision of the "majority of the judges of the Court of King's Bench in "1821, in *Blundell v. Catteral*,³ to hold in strict law, this proposition is well founded. The public are not entitled to cross "the shore even for the purposes of bathing or amusement. "The sands on the sea shore are not to be regarded as, in the full "sense of the word, a highway. A more extensive right may "possibly have been gained by prescription or by custom, either "by individuals or by the permanent or temporary inhabitants "of Llandudno; but the existence of this more extensive right "must be proved, and will not be presumed in the absence of "proof. The plaintiffs have, therefore, every right to treat every "bather, every nursemaid with a perambulator, every boy riding "a donkey, and every preacher on the shore at Llandudno as a "trespasser. In the present case there is no evidence from "which I can find the existence of a legal usage or custom "entitling the defendant to deliver sermons or addresses on the "shore at Llandudno. . . . I feel bound to say that I consider "this action wholly unnecessary, and one which ought not to "have been brought. It is no part or duty of the council, as "lessees from the Crown for an unexpired term of two years, to "prevent a harmless user of the shore. . . . This action is an "attempt to assert rights which the Crown would never have "thought of putting forward, and which are in no way necessary "for the peace and good order of the town of Llandudno. . . . I "cannot refuse to make a declaration that the defendant is not "entitled without the consent of the plaintiffs to hold meetings

¹ Hall, 156—186; Angell on Tidal Waters, 28. See *Laird v. Briggs*, 19 Ch. D. 22.

² (1899) 2 Ch. 705.

³ 5 B. & Ad. 268.

"or deliver addresses, lectures or sermons on any part of the foreshore in lease from the Crown. But I decline to go further. I decline to grant an injunction. That is a formidable legal weapon which ought to be reserved for less trivial occasions. And I make no order as to costs."

It would appear that the only restraint which by the common law is imposed upon the common liberty of bathing in the sea and tide waters, where no right of private property is involved, is that which is imposed by decency and a respect for public morals. The laws of decency must be enforced in all places which become the habitations of civilized man.¹ Hence it has been held that it is an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he may be distinctly seen, although the houses may have been recently erected, and although it may have been usual up till then for men to bathe in great numbers at the place in question.²

It has been held in a later case that where the shore is held by lease from the Crown, an immemorial custom of bathing along the shore gives no right to persons availing themselves of it to place machines there, whether drawn by horses or by means of a capstan; and that a prohibition in a provisional order under an Act of Parliament to bathe without a machine, does not operate to confer a right to place a machine on such land for the purpose of bathing.³

Rights to
sand, shells
and seaweed.

Sand, shells, and seaweed, being natural products of the shore, belong, it would seem, *prima facie* to the Crown or its grantees,⁴ and there is no general right in the public to enter the shore and take them.⁵ When, however, the soil is in the Crown, it is to be presumed that the taking of them would be permitted if it was not injurious to the navigation.⁶ A lord of a manor cannot claim an exclusive right to cut seaweed *below low water mark* except by grant or prescription from the Crown.⁷ Seaweed

¹ Angell, 34.

² *Ree v. Crunden*, 2 Camp. 89; 11 R. R. 671.

³ *Mace v. Philcox*, 15 C. B., N. S. 600.

⁴ See per Best, J., in *Blundell v. Cutler*, 24 R. R. 353; *Hove v. Stawell*, 1 A. & Nap. 356, and note at p. 357; Angell on Tidal Waters, 260. See also *Daly v. Murray*, 17 L. R., Ir. 185, where evidence of user of foreshore by taking seaweed was held admissible to establish title to the foreshore.

⁵ *Hove v. Stawell*, 1 A. & Nap. 356; *Bagot v. Orr*, 2 Bos. & Pul. 472; 5 R. R. 668; *Hamilton v. A.-G. for Ireland*, 5 L. R., Ir. 555.

⁶ Per Best, J., in *Dickens v. Shaw*, Hall on the Sea Shore, App. 68.

⁷ *Benest v. Pipon*, 1 Knapp. P. C. 60. As to duty to remove decomposed seaweed which had become a nuisance, see *Margate Local Board v. Margate Harbour Co.*, 2 L. T. 564.

thrown on the land by extraordinary tides belongs to the owner of the property on which it is thrown;¹ so does sand drifted by the wind.² Seaweed cast on a private shore between high and low water mark is not the subject of larceny, but trover will lie for it.³

A right to take sand and shingle may exist and be claimed by prescription. As such a claim is, however, the claim to a *profit à prendre* in the soil of another, it cannot be supported by proof of a custom in the inhabitants of a township; for such a custom would be void, as a *profit à prendre* can only be claimed by grant or prescription.⁴ Nor could it be claimed by such inhabitants by prescription, as it was a claim by persons not a corporation, and thus incapable of taking by grant; and, moreover, was not claimed by them in a *que estate*.⁵ Where, however, the custom was for the good of the navigation, a custom for the freemen of an ancient borough and the proprietors of ships to dig gravel was held good.⁶

By prescription.

A claim of this kind may, however, be supported by prescription by an individual through his ancestors, or in the name of a corporation and its predecessors, or as appurtenant to some estate holden by the claimant.⁷

A tenant under a building agreement with the lord of the manor, who has only a right of entry upon the foreshore for the purposes of that agreement, cannot maintain an action against a defendant who sets up a forty years' uninterrupted use and enjoyment of the foreshore by taking shingle thereon and putting bathing machines thereon.⁸

By 7 Jac. I. c. 18, the taking of sand from the shore for agricultural purposes by the inhabitants of Cornwall and Devon is made lawful; but whether this was in confirmation of a prior custom so to do seems doubtful.⁹

¹ *Lowe v. Gorett*, 3 B. & Ad. 863; 37 R. R. 560; *Baird v. Fortune*, 7 Jur. N. S. 926, per Lord Campbell, C. J.

² *Blewett v. Tregonning*, 3 A. & E. 554; 42 R. R. 463.

³ *Reg. v. Clinton*, Ir. R., 4 C. L. 6.

⁴ As to claim of inhabitants to dredge for oysters, see *Goodman v. Saltash Corporation*, 7 App. Cas. 633, and remarks of Kay, J., on this case in *Tilbury v. Silva*, 45 Ch. D. 98, *post*, Chap. VI.

⁵ *Constable v. Nicholson*, 14 C. B., N. S. 230; *Pitts v. Kingsbridge*, 19 W. R. 884; see also *Bland v. Lipcombe*, 24 L. J., Q. B. 155, n.; *Race v. Ward*, *ibid.*; *All-*

good v. Gibson, 34 L. T., N. S. 883; *A.-G. v. Mathias*, 27 L. J., Ch. 761; *Gateward's case*, Cro. Jac. 152; *Macnamara v. Higgins*, 4 Ir. C. L. R. 326; as to right of surveyors of highways to take shingle, see *Clowes v. Beck*, 20 L. J., Ch. 505.

⁶ *Mayor of Lynn v. Tayler*, 3 Lev. 160.

⁷ Angell on Tidal Waters, 273; *Constable v. Nicholson*, 14 C. B., N. S. 230.

⁸ *Laird v. Briggs*, 19 Ch. D. 22.

⁹ See Hall on the Sea Shore, 95; Hale de Jure Maris, c. 6.

Ports and Harbours.

Definition.

A harbour or haven is a place naturally or artificially made for the safe riding of ships.¹ A port is a haven and something more; it is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries.² All ports comprehend a city or borough called *caput portus*, with a market and accommodation for sailors.³ A port is a place where a vessel can lie in a position of more or less shelter from the elements, with a view to the loading or discharge of cargo. The natural configuration of the land is, therefore, often a most important element in determining what are the limits of a port. All the waters within given boundaries which possess the common character of safety and protection would be generally admitted to be within its ambit. Where, however, a port is one of several situate on the same river, it is obvious that the natural configuration of the land is not of the same importance and does not afford the same guidance.⁴

The limits of a port vary according to the purpose for which it is instituted; and a port for fiscal purposes is not the same as it is for municipal or local purposes or for pilotage or for commercial purposes.⁵

Privilege of erecting ports part of prerogative of the Crown.

The privilege of erecting ports at which customable goods may be landed, and of taking dues and tolls as incident thereto, is part of the royal prerogative, and can only belong to a subject as a franchise by grant or prescription from the Crown, or by Act of Parliament.⁶ No subject has therefore a right to land customable goods on his own land, or elsewhere than at a public port. There is no restriction in the landing of goods not customable at private wharves, even in public ports, on the taking of such tolls for landing, &c., as may be agreed upon between the parties;⁷ but no general toll can be taken at such wharves, a right to a toll depending in all cases on grant, prescription, or Act of Parliament.

¹ Hale De Portibus Maris, c. 2.

² Houck's Navigable Rivers, 175.

³ Hale de Port. Maris, c. 11.

⁴ Per Lord Herschell in *Hunter v. Northern Marine Insurance Company*, 13 App. Cas. 717, H. L. Sc.

⁵ See *Sailing Ship "Gurdon" Co. v. Hickie*, 15 Q. B. D. 580; *Hunter v. Northern Marine Insurance Co.*, 13 App. Cas. 717, H. L. Sc. See also Encyclo-

pædia of Laws of England, art. "Port," pp. 215 *et seq.*

⁶ Hale de Port. Maris, c. 2; Houck, 176; 2 Stephen's Blackstone, 7th ed. 499; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

⁷ Hale de Port. Maris, c. 6; Houck on Navigable Rivers, 184; *Baltimore Wharf case*, 3 Bland Rep. 383 (American).

The Crown may grant to a subject the right to erect a port on his own land, or on the land of another, provided, in the latter case, no vested interests are interfered with.¹

May be granted to a subject.

The ownership of the soil of all ports, as well as of the sea shore between high and low water mark, is vested *prima facie* in the Crown, and the Crown might formerly have conveyed the soil to a subject by grant or royal charter, either apart from or in conjunction with the franchise.² Where a subject has, by grant or prescription, the franchise of a port, it would appear to be evidence that he has the soil also, though this evidence will not be conclusive, as the franchise may exist apart from the soil.³ A port may, it would seem, pass as parcel of a manor.⁴

Ownership of soil of ports.

The ports of this country are now almost exclusively the property of corporate bodies by ancient grant or charter from the Crown, or by Act of Parliament, by which the powers and duties of the trustees and the public in each particular port are regulated, and to which, in all cases of disputes, reference must be made.

Ports now generally vested in trustees.

The Crown, in virtue of its prerogative, and of its office of Lord High Admiral, is conservator of all ports, havens, creeks, and arms of the sea, and protector of the navigation thereof.⁵

Conservancy of ports.

Although, formerly, the king had a power of granting the franchise of havens and ports, yet he had not the power of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandize in any part of the haven, whereby the revenue of customs was much impaired and diminished by fraudulent landing in obscure corners. This abuse caused statutes to be passed, enabling the Crown to ascertain the limits of all ports, and to assign proper quays for the exclusive landing and loading of merchandize; and this duty, as well as those of appointing ports and sub-ports, and declaring the limits thereof, was confided, by 16 & 17 Vict. c. 107, s. 9, to the Commissioners of her Majesty's Treasury.⁶ This Act was repealed by the Customs Consolidation Act, 1876, 39 & 40 Vict. c. 36, which provides for the appointment of a Customs Board under the control of the Treasury, and the latter

¹ *Mayor of Exeter v. Warren*, 5 Q. B. 773.

² See *ante*, p. 17.

³ See *ante*, pp. 21-29.

⁴ See *Hale de Port. Maris*, 57; *Foreman v. Free Fishers of Whitstable*, L. R.,

3 C. P. 584; 21 L. T. 804.

⁵ See *Hale de Jure Maris*, Harg. Tr. 23.

⁶ 2 Stephen's *Blackstone's Com.* p. 535, 7th ed.

Act has been further amended by the Customs Consolidation Acts, 1877, 1878, 1881, 1882, 1883, 1884, 1887, 1889 and 1890. By 10 & 11 *Vict. c. 27*,¹ the provisions ordinarily inserted in local Acts of Parliament, passed for the construction and improvement of particular harbours, docks and piers, are consolidated into a single statute, so as to be embodied by way of reference in any special Act without needless repetition; and with the object of obviating the necessity in certain cases of obtaining, at great expense, a special local Act for such construction, the Board of Trade is now enabled, by 24 & 25 *Vict. c. 45*, to make provisional orders authorizing the construction of any pier, harbour, quay, wharf, jetty, or excavation by private undertakers, upon application made to the Board, but such orders are of no validity or force until confirmed by Act of Parliament.² By 25 & 26 *Vict. c. 69*, various powers and duties relative to harbours and navigation were transferred from the Admiralty to the Board of Trade; sect. 5 of which enacts, "that with respect to any special Act "that may be passed after the end of the present session of "Parliament, the following sections of the Harbour, Docks and "Piers Clauses Act, 1847, and all provisions relative thereto in "that Act, or in any future special Act contained, shall be "construed as if the Board of Trade were named in the said "sections instead of the Admiralty, viz., in sects. 12, 13, 16, "18, 19." Harbour authorities have also special facilities for keeping their harbours in good order and clear of obstructions. Thus by 23 *Hen. VIII. c. 8* and 27 *Hen. VIII. c. 23* provision was made for guarding harbours in Devon and Cornwall from being injured by tin workings near them; and 54 *Geo. III. c. 159* prohibits the removal of ballast or shingle from the shores or banks of any port, harbour or haven, and no ballast or rubbish may be thrown into them.³ No obstruction to navigation is allowed, and the act of discharging water containing solid matter in suspension into a tidal brook which flowed into a tidal river, and was carried down and deposited

¹ The Harbour, Docks and Piers Clauses Act, 1847, extends to such harbours, docks or piers as shall be authorized by Acts hereafter to be passed which shall declare that this Act shall be incorporated therewith (sect. 1). The Lands Clauses Consolidation Acts, 1845, are to apply as to the purchase of lands, and the Railways Clauses Consolidation Acts, 1845, with

respect to recovery of damages. Plans are to be deposited with clerks of the peace, and approved by the Admiralty and Commissioners of Woods and Forests. Powers are also given to the undertakers to make and enforce bye-laws.

² 2 Stephen's Blackstone, p. 501.

³ *Nicholson v. Williams*, L. R., 6 Q. B. 632.

in the tidal river, though not so as to obstruct its navigation, has been held punishable by penalty.¹ By 28 & 29 Vict. c. 125 (the Regulation of Dockyard Ports Act, 1865) special provision is made for the regulation of dockyard ports.² Under sect. 9 and sched. I. of the Public Works Loans Act,³ the Loan Commissioners are empowered to make loans to any person authorized for the purpose of constructing and improving docks, harbours and piers, and any work for which the Public Works Loan Commissioners are authorized to lend by 24 & 25 Vict. c. 47.⁴ By the Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60, ss. 530—534, harbour and conservancy authorities are empowered to remove vessels sunk, stranded or abandoned in harbours or tidal waters, where such wreck is or is likely to become an obstruction.⁵

The most important incident to the ownership of a port is the right to take various dues and tolls for the use of it, such as anchorage and tonnage dues which arise from the ownership of the soil of the port, or from the ownership of the franchise apart from the soil,⁶ and wharfage dues which arise generally from the ownership of the adjoining lands.⁷

The right to take dues for the use of a port exists only by Act of Parliament, by express grant from the Crown, or by immemorial usage which presupposes such a grant, and from which, if uncontradicted, a grant must be presumed.⁸ Thus, where by Act of Parliament the plaintiffs were authorized to make a dock, and all goods which should be landed or discharged upon any of the quays should be liable to pay the like rates of wharfage as were usually taken for goods, &c., loaded or discharged on quays in the port of London, it was held, that as the premises were only vested in the company for the purposes of the Act, they had no common law right to compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays.⁹

In no case can a claim for dues and tolls be supported, unless

Tolls and dues

can only be taken by Act of Parliament or by express or implied grant from the Crown.

Consideration necessary to

¹ *United Alkali Co. v. Simpson*, (1894) 2 Q. B. 116.

² See *Encyc. Laws England*, art. "Harbour."

³ 38 & 39 Vict. c. 89.

⁴ Harbours and Passing Tolls Act, 1861.

⁵ As to duty to remove seaweed which decomposed and became a nuisance, see *Margate Local Board v. Margate Harbour Co.*, 2 L. T. 564.

⁶ *Hale de Port. Maris*, c. 6; *Foreman*

v. Freer Fishers of Whitstable, L. R., 4 H. L. 281; 21 L. T. 804.

⁷ *Hale de Port. Maris*, c. 6; *Woolrych on Waters*, p. 301; see *Sargent v. Reed*, 1 Wils. 91; *Culton v. Smith*, 1 Cowp. 47.

⁸ See *Jenkins v. Harvey*, 1 C., M. & R. 877; 40 R. R. 769.

⁹ *Kingston-on-Hull Docks v. La Marche*, 8 B. & C. 42; 32 R. R. 337; 1 Mod. 105, per Hale, C. J.

support a
claim to toll.

some consideration can be shown on which to found the claim, an express grant from the Crown being void unless founded on sufficient consideration, for the creation of a toll is only a mode of paying for a public service.¹ It has, however, been held that the making of a port is of itself a sufficient consideration for such a claim,² even when the soil is in another.³ So is the right to bring ships into a port for safety, and the liberty to unload goods there.⁴

The maintaining a wharf and keeping a measure for measuring salt has, however, been held not to be sufficient to support a claim to have a bushel of salt from every ship laden with salt passing by the wharf; Hale, C. J., in that case saying, "the prescription is not for a port but for a wharf. If any man prescribe for a toll upon the sea, he must allege a good consideration, because by *Magna Charta* and other statutes every one hath a liberty to go and come upon the sea without impediment."⁵

No toll, therefore, can be claimed outside a port, unless some actual benefit is given as an equivalent for the payment; and a claim for toll, to be for the right of passage and anchorage, merely as incident to the ownership of the soil of the sea beyond the limits of a port, cannot be sustained,⁶ though possibly a customary payment might be claimed in such a case for actual injury done to property, as by a grounding of a ship on an oyster bed.⁷ Where any actual benefit can be shown to the navigation, such as the keeping of a capstan and rope to assist boats in bad weather, a sufficient consideration exists to support a prescriptive right to take toll from all boats frequenting a cove (not within a port), whether such boats use the capstan or not, the existence of the capstan being necessary for the safety of the navigation in bad weather,⁸ and it not being necessary that the benefit conferred should be precisely that in respect of which the toll is claimed.⁹

¹ *Fulmouth v. George*, 5 Bing. 286; 30 R. R. 597; *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192; *Brett v. Beales*, 10 B. & C. 508; 34 R. R. 499; *Hill v. Smith*, 4 Taunt. 520; 10 R. R. 357; *Warren v. Prideaux*, 1 Mood. 104; *Haspurt v. Wills*, 1 Mod. 47; *Vinkenstern v. Ebdon*, 1 Ld. Raym. 384; 1 Salk. 248.

² *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402.

³ *Mayor of Exeter v. Warren*, 5 Q. B. 773.

⁴ *Mayor of London v. Hunt*, 2 Lev. 37; *Wilkes v. Kirby*, 2 Lutw. 1519; Woolrych on Waters, p. 300.

⁵ *Haspurt v. Wills*, 1 Mod. 47.

⁶ *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192.

⁷ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁸ *Fulmouth v. George*, 5 Bing. 286; 30 R. R. 597.

⁹ See *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 285; 21 L. T. 804.

The right to take dues and tolls implies a corresponding duty on the owner of the port to keep it in repair,¹ and the owner of a port or dock will be liable for damage caused by his neglect in so doing, even where the tolls taken are not for his benefit, but are devoted to the maintenance of the port or dock.² It is not, however, necessary for an owner of a port to show that he has actually kept the port in repair to enable him to recover the dues, the consideration for such dues not being the actual repair, but the fact of the owner being bound by custom so to repair,³ and it being possible that the port may never need repairs.⁴

Duty to repair.

It has further been decided in a late case that anchorage dues may be claimed in a port which is a natural roadstead and not artificially formed, although there be no obligation to repair it and keep it accessible, so as to form a consideration for the toll.⁵ This last case is one of considerable importance, as in it the question of tolls was very fully considered, and it may be well to state it at some length. *The Company of Free Fishers of Whitstable*, lords of the manor of Whitstable, brought an action against one Foreman to recover tolls in respect of the anchorage of his ship within their manor below high water mark. In a former action they had claimed this toll solely as a customary payment for the use of the soil; and the House of Lords held that such a claim could not be supported, for the right of free passage and the use of the sea as a highway, including the right of anchorage, is paramount to the right of property in the soil, and cannot be interfered with, either by the Crown as owner of a manor, or by a subject to whom such ownership had been transferred.⁶ In the present case the toll was claimed generally by the respondents as owners of the manor, and the point on which the whole question turned was whether the *locus in quo* was or was not a port. It appeared from the special case stated for the opinion of the Court, that the soil and fishery of the *locus in quo* belonged to the plaintiffs, the lords of the manor; that though there was no direct evidence that it was a port, yet tolls

Foreman v. Free Fishers of Whitstable.

¹ *Jenkins v. Harrey*, 1 C., M. & R. 877; 40 R. R. 769; *Mayor of Exeter v. Warren*, 5 Q. B. 773.

² *Mersey Dock Co. v. Gibb*, L. R., 1 H. L. 93; 35 L. J., Ex. 225; 14 L. T. 677; and see *post*, Chap. VII.

³ *Vinkenstern v. Elden*, 1 Salk. 248; 1 Lal. Raym. 384.

⁴ *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. As to liability of a dock

company for negligence of its servants, see *Mersey Dock Co. v. Gibb*, L. R., 1 H. L. 93; and for liability to repair under statutory provisions, *Reg. v. Bristol Dock Co.*, 2 Rail. Cas. 599; *ibid.* 1 Rail. Cas. 548; and *post*, Chap. VII.

⁵ *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266; 21 L. T. 804.

⁶ *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192.

*Foreman v.
Free Fishers
of Whit-
stable.*

had been taken from time immemorial for vessels casting anchor there by the lords of the manor; that the lords had the right to wreck and toll for merchandize landed within the manor; and that they had immemorially maintained beacons and buoys, partly, however, for the protection of their oyster beds. The Court of Common Pleas held that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the anchorage and the benefit of the public therefrom, was sufficient consideration to support the claim for anchorage dues.¹ On appeal, the Court of Exchequer Chamber—Bramwell and Martin, BB., *diss.*—affirmed this judgment; Kelly, C. B., thus stating the grounds on which the opinion of the Court was based: “We think there is ample evidence to justify the presumption both that there was here by prescription an ancient port, and that before the time of legal memory the lord of the manor, being also owner of the fishery and soil under the sea, had consented to the formation of the port on the terms that he should have toll on merchandize landed and anchorage from vessels anchoring or grounding in the haven, he at the same time agreeing to keep up the buoys, chiefly, in all probability, for the object of protecting the oysters, but incidentally guiding vessels to a safe anchorage. If this was so, there was ample consideration to support the customary payment, and we think, in order to support an immemorial payment, we ought to make this presumption.”² The House of Lords, on appeal, unanimously affirmed the judgment, holding that, exclusive of the evidence as to buoys and beacons, there was sufficient evidence to show the former existence of a port in the *locus in quo*, from the immemorial payments of the tolls for merchandize and anchorage dues; for as anchorage dues were almost, if not universally, incident to the ownership of a port, and as every intendment should be made in favour of a payment uninterruptedly made time out of mind, they were justified in drawing the inference of fact that a port did exist, and therefore that the toll had a legal origin; and that this inference was not rebutted by the fact that the port was not artificially formed, but was a natural roadstead, imposing no obligation on the owner to repair it and keep it accessible, so as to form a consideration for the anchorage toll, for that the repair of a port was not a necessary

¹ L. R., 2 C. P. 688.

² L. R., 3 C. P. 586.

consideration for such a toll.¹ Lord Chelmsford, in his judgment, went even further than this, holding that from the immemorial payment of the anchorage toll alone, the Courts, in the absence of anything to compel them to assign a different foundation for it, were bound to presume that the lords of the manor were the owners of a port to which such a toll would be lawfully incident.²

No general toll can, as has been said, be taken in any public ports, or at any wharves which have been dedicated to the public, and at which customable goods are necessarily landed, except by grant, prescription, or Act of Parliament, founded on some corresponding benefit to the public as a *quid pro quo*. In addition to this the toll taken must be reasonable in amount, and must not be unreasonably enhanced.³ This, of course, does not refer to private wharves where the rates charged in each particular case are a matter of bargain between the parties.⁴

Tolls must be reasonable.

¹ L. R., 4 H. L. 266.

² L. R., 4 H. L. 286.

³ *Heddy v. Wheelhouse*, Cro. Eliz. 558; *Falmouth v. George*, 5 Bing. 286; 30 R. R. 597; Hale de Port. Mar., Harg. Tr. 78; Chitty on Prerogative, 195; Comyns' Dig. Market; Inst. 220; see also

as to tolls, *The Baltimore case*, 3 Bland, 383 (American); *Brune v. Thompson*, 4 Q. B. 543.

⁴ As to tolls generally see *post*, Chap. VIII., and as to navigation, Chap. VII.

CHAPTER II.

OF INLAND WATERCOURSES ; THE OWNERSHIP OF THE SOIL
THEREOF, AND OTHER MATTERS.

Definition of
a water-
course.

A WATERCOURSE may be defined as a body of water issuing *ex jure nature* from the earth, and by the same law pursuing a certain direction in a defined channel, till it forms a confluence with the sea.¹ “A spring of water, both in law and in ordinary language, “is, as I understand it,” says Jessel, M. R.,² “a natural source “of water, of a definite and well-marked extent. A stream of “water is water which runs in a defined course, so as to be “capable of diversion ; and it has been held that the term “does not include the percolation of water underground.” “A “spring,” says Brett, L. J.,³ “is not an artificial space, but a “natural chasm in which water has collected, and from which it “either is lost by percolation, or rises in a defined channel.”

A watercourse, *flumen vel cursus aque*, has been defined by Lord Tenterden, C. J., as water flowing in a channel between banks more or less defined.⁴

Woolrych defines a river as a running stream pent in on either side with walls and banks, and it bears that name as well where the waters flow and reflow, as where they have their current one way.⁵ This definition includes, therefore, all natural streams, however small, which have a definite and permanent course, and excludes all bodies of water, however large, which are of a temporary character, *i.e.*, which are dependent on the will or convenience of individuals for their volume or duration.⁶

Subterranean
streams.

A subterranean stream may flow in such a known and defined channel as to give rise to similar rights as would exist aboveground.

¹ Angell on Watercourses, 2 ; Woolrych on Waters, 40 ; Woolrych on Sewers, 31 ; Phear, Rights of Water, 31.

² *Taylor v. St. Helen's*, 6 Ch. Div. 264 (C. A.) ; 46 L. J. Ch. 857 ; 37 L. T. 253.

³ *Brain v. Marfell*, 41 L. T., N. S. 457.

⁴ *Rez v. Inhabitants of Oxfordshire*, 1 B. & A. 301 ; 35 R. R. 302 ; Callis on Sewers, 77. The river Parrett at Bridgewater, though an arm of the sea, assumed

to be a “watercourse” within the meaning of a drainage Act by Lord Macnaghten : *Somerset Drainage Commissioners v. Bridgewater Corporation*, 81 L. T. 729. H. L. (1900), at p. 730.

⁵ Woolrych on Waters, 40 ; Callis on Sewers, 77 ; Houck on Navigable Rivers, 1 ; Phear on Rights of Water, 31.

⁶ *Briscoe v. Drought*, 1r. R., 11 C. L. 264 ; *Arkwright v. Gell*, 5 M. & W. 203 ; 8 L. J., Ex. 201.

"If," says Pollock, C. B., "the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterraneous course, and then emerge again, it could never be contended that the owner of the soil under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover, if the stream had been wholly above ground."¹ "According to my apprehension," says Lord Watson in a late case in the House of Lords, "the word 'stream' in its primary sense denotes a body of water having, as such body, a continuous flow in one direction. It is frequently used to signify running water at places where its flow is rapid, as distinguished from its sluggish current in other places. I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface; but in my opinion, water, whether falling from the sky or escaping from a spring which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata, and simply percolates through or along those strata, until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a stream, and I may add that the insertion of a common rubble or other agricultural drain in these strata, whilst it tends to accelerate percolation, does not constitute a stream as I understand the expression."²

The principles which regulate the rights to water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water, whether under or above ground, having no certain course or defined limits, such as that merely percolating through the strata of the earth, or that diffused over its surface, such water not being subject to the law of watercourses.³

A stream begins at the point where the water palpably rises to the surface and forms a channel,⁴ and extends till it mingles with the sea outside the body of a county.⁵

Surface and percolating water.

Limits of a watercourse.

¹ *Dickenson v. Grand Junction Canal*, 7 Ex. 300; 21 L. J., Ex. 201; *Chasemore v. Richards*, 7 H. L. 374, per Lord Chelmsford; *Dudden v. Clutton Union*, 11 Ex. 627; 26 L. J., Ex. 146.

² *McNab v. Robertson*, (1897) App. Cas., H. L. Sc. 129.

³ *Acton v. Blundell*, 7 M. & W. 324;

McNab v. Robertson, (1897) App. Cas., H. L. Sc. 129; *Bradford Corporation v. Pickles*, (1895) App. Cas. 587, and cases *post*, pp. 188 *et seq.*

⁴ *Dudden v. Clutton Union*, 26 L. J., Ex. 146, 11 Ex. 627; Phear, 33.

⁵ See *Reg. v. Keyn*, 2 Ex. Div. 62.

In a late case in the Exchequer it appeared that the water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring was cut off at its source, and the water was received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose. The action was for diversion by the mill-owner. The judge at the trial told the jury that the questions for them were, whether there was a natural or defined watercourse from the spring-head to the stream, and if so, whether the defendant had diverted water from this watercourse. Pollock, C. B., said: "The real question is, whether there is a natural watercourse which, but for the acts done by the defendant, would have conveyed water to the stream, and from thence to the mill of the plaintiff. If there is a natural spring, the waters of which flow in a natural channel, it cannot be lawfully diverted by any one to the injury of the riparian proprietors. The law of the case is clear and undoubted. This was a natural spring, the waters of which had acquired a natural channel from its source to the river. It is absurd to say that a man might take the water of such a stream, four feet from the surface." Martin, B.: "A river begins at its source when it comes to the surface, and the owner of the land on which it rises cannot monopolize all the water at the source, so as to prevent its reaching the lands of other proprietors lower down."¹

In the case of *Mostyn v. Atherton*² it was held that the principle laid down in *Dudden v. Clutton Union* was not affected by the fact that the source of the spring had been built round and formed into a well, thus making an artificial channel for a short distance.

A watercourse must flow in a regular channel, but may be occasionally dry.

It is not, however, necessary to constitute a watercourse that the water should flow continually, as a channel may be occasionally dry,³ but it must appear that the water flows usually in a regular channel, and has a well-defined and substantial existence,⁴ the law making a distinction between a regular flowing stream which at certain seasons is dried up and those occasional bursts of water which in times of freshets and melting of snows

¹ *Dudden v. Clutton Union*, 11 Ex. 627; *Raistrick v. Tayler*, 11 Ex. 369; 25 L. J., Ex. 33; *Wood v. Waud*, 3 Ex. 748, 779; 18 L. J., Ex. 305; Angell on Watercourses, 5, 6; see also *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; 8 L. T. 238.

² (1899) 2 Ch. 360; 68 L. J., Ch. 629; 81 L. T. 356; 48 W. R. 168. See as to percolating water, *post*, pp. 196 *et seq.*

³ See *Drewett v. Sheard*, 7 Car. & P. 465; 48 R. R. 797; *Trafford v. Reg.*, 8 Bing. 204; 34 R. R. 680.

⁴ Angell on Watercourses, 5.

descend from the hills and inundate the country.¹ So also the waste water from a canal, allowed to pass out of the canal, is not a watercourse to which any of the doctrines either as to natural or artificial streams will apply.² "The water passing from the Wolverhampton Level to the Atherly Junction," says Lord Cranworth, "is not a natural, nor even an artificial, stream in the sense in which these words are understood in the many cases in which the law relating to flowing water has been considered. The water in this canal is not flowing water. It is water accumulated under the authority of the legislature in what is in fact only a tank or reservoir, which the respondents are bound to economize, and use in a particular manner for the convenience of the public. It never flows. It is let down artificially, for the convenience of persons wishing to pass with boats, by what may be called steps, till it reaches the Atherly Level, and so enables the boats to pass into appellant's canal. To such water none of the doctrines either as to natural or artificial streams is applicable."

Every watercourse, says Mr. Angell,³ consists of—1. The bed ; 2. The bank or shore ; 3. The water. The bed is covered by the water, and is the space subjacent to the water through which it flows, and is that which contains the water at its fullest when it does not overflow its banks. It is, generally speaking, all the soil below the high water mark either of the ordinary daily tides or of the ordinary floods.⁴ "The bed of a river is the *altus*, as distinguished from the shore, and from places where flood waters occasionally collect."⁵ The bank is the outermost part of the bed in which the river naturally flows. The bed and the water may be said to be correlative terms, as one cannot be owned without touching the other.⁶ "The bed of the river is that portion of its soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the

A water-course consists of bed, bank and water.

¹ *Ibid.* ; see also *Drewett v. Sheard*, 7 Car. & P. 465 ; 48 R. R. 797.

² *Staffordshire Canal v. Birmingham Canal*, L. R., 1 H. L. 254, 272 ; 35 L. J., Ch. 757 ; *Rockdale Canal v. Radcliffe*, 18 Q. B. 287 ; 21 L. J., Q. B. 297 ; *McEroy v. Great Northern Rly.*, (1900) 3 Ir. R. 325. See *post*, pp. 235 *et seq.*, and also Chap. V.

³ Angell on Watercourses, 30 ; Grotius

de Jur. Belli, 2, 8, 9.

⁴ As to this, see *Menzies v. Breadalbane*, 3 Wils. & Shaw, 243 ; 32 R. R. 103.

⁵ Per Lord Campbell, C. J., in *Abraham v. Great Northern Rly.*, 16 Q. B. 592. See *R. v. Oxfordshire*, 1 B. & A. 289 ; 35 R. R. 302 ; *Reg. v. Derbyshire*, 2 Q. B. 745, 755.

⁶ Angell on Watercourses, 30.

"extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."¹ This, when applied to a tidal river, means without reference to extraordinary tides at any time of the year—and includes, therefore, the portion of the bed between high and low water mark of ordinary tides, or, in other words, the soil between ordinary high water mark on one side and ordinary high water mark on the other side.²

The right to the use of the water of a watercourse does not arise from the ownership of the soil thereof.

It is generally laid down in the text-books and in the earlier reported cases that the right of private property in a watercourse is derived as a corporeal right and hereditament from or is embraced in the ownership of the soil over which it naturally passes, according to the well-known maxim, *cujus est solum, ejus est usque ad cælum*.³ "A watercourse," says Woolrych,⁴ "may be either a real or a corporeal hereditament. If by grant, prescription, or otherwise, one should have an easement of this kind in the land of another person, it would partake of the latter quality; but if the water flow over the party's own land, although indeed it cannot be claimed as *water*, yet it is in effect identified with the realty, because it passes over the soil, and *cujus est solum ejus est usque ad cælum*." "An action cannot," says Blackstone,⁵ "be brought to recover the possession of water by the name of water only, but it must be brought in respect of the land which lies at the bottom, and the description of it must be—so much land covered with water." From this identification of the land with the water a grant of a field or meadow will carry all the timber and water standing and being thereupon.⁶ This doctrine is supported by modern authority with regard to standing and percolating water, and also, it would appear, with regard to running water which rises and remains for the whole of its course on the land of a single owner, for in such cases the water is the absolute property of such owner, and no one is entitled to share the use of it with him;⁷ but with

¹ *State of Alabama v. State of Georgia*, 64 U. S. 515; cited by A. L. Smith, L. J., in *Thames Conservators v. Sneed & Co.* (1897) 2 Q. B. 334, and *Hindson v. Ashby*, (1896) 2 Ch. 1, at p. 25.

² *Thames Conservators v. Sneed & Co.*, (1897) 2 Q. B. 334, overruling *Pearce v. Bunting*, (1896) 2 Q. B. 360, *post*, Chap. VII. See also *Howard v. Ingersoll*, 54 U. S. 38, cited and adopted by Romer, L. J., in *Hindson v. Ashby*, (1896) 1 Ch. 78, at pp. 84, 85.

³ Angell on Watercourses, 8; Wool-

rych on Waters, 146; Phear on Waters, p. 22; 1 Stephen's Black., 7th ed., pp. 659, 693; Co. Litt. 4; *Rex v. Wharton*, Holt, 499.

⁴ Page 146.

⁵ 2 Comm. 18.

⁶ Angell on Watercourses, 9; 1 Greenleaf's ed., Cruise's Dig. 37.

⁷ See *Holker v. Porritt*, L. R., 10 Ex. 59; *Chasemore v. Richards*, 7 H. L. 349; 29 L. J., Ex. 81; *Acton v. Blundell*, 12 M. & W. 324; *New River Co. v. Johnson*, 2 E. & E. 435; and *post*, Chap. III.

regard to natural streams flowing through adjoining lands, the enjoyment of which is only usufructuary and not absolute, the right to use the water has been held in modern cases not to arise from the ownership of the soil on the stream, but from the right of access to it which landowners on its banks have by the law of nature.¹ "With respect to the ownership of the bed "of the river," says Lord Selborne in *Lyon v. Fishmongers' Co.*, "this cannot be the foundation of riparian rights properly so called, because the word riparian is relative to the banks and not to the bed of the stream; and the connection, when it exists, of property on the banks with property in the bed of the stream depends not upon nature, but on grant or presumption of law. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good *jure nature* as vertical;² and not only the word 'riparian,' but the best authorities, such as *Miner v. Gilmour*,³ and the passage which one of your Lordships has read from Lord Wensleydale's judgment in *Chasemore v. Richards*,⁴ state the doctrine in terms which point to lateral rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of a stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right." Lord Cairns, L. C., says, in the same case:⁵ "I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream. The late Lord Wensleydale observed in this House, in the case of *Chasemore v. Richards*,⁶ 'The subject of right to

But from the right of access thereto.

¹ *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; 45 L. J., Ch. 68; 36 L. T. 569. An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoyed and still of right ought to have and enjoy the water of a stream alongside the lands and premises, is not supported by proof that the plaintiff was the lessee of mines under lands

adjoining the stream with a grant from the surface owner of the use of the water for colliery purposes: *Insole v. James*, 1 H. & N. 243; 4 W. R. 680.

² See *North Shore Rly. v. Pion*, 14 App. Cas. 612.

³ 12 Moo., P. C. 131.

⁴ 7 H. L. 349; 29 L. J., Ex. 81.

⁵ Page 673.

⁶ 7 H. L. 382.

“ ‘streams of water flowing on the surface has been of late
 “ ‘years fully discussed, and by a series of carefully considered
 “ ‘judgments placed upon a clear and satisfactory footing. It
 “ ‘has been now settled that the right to the enjoyment of a
 “ ‘natural stream of water on the surface, *ex jure naturæ*, belongs
 “ ‘to the proprietor of the adjoining lands, as a natural incident
 “ ‘to the right to the soil itself, and that he is entitled to the
 “ ‘benefit of it, as he is to all the other natural advantages
 “ ‘belonging to the land of which he is the owner. He has the
 “ ‘right to have it come to him in its natural state, in flow,
 “ ‘quantity and quality, and to go from him without obstruction,
 “ ‘upon the same principle as he is entitled to the support of
 “ ‘his neighbour’s soil for his own in its natural state. His right
 “ ‘in no way depends on prescription or the presumed grant of
 “ ‘his neighbour.’ ” In the case of *Embrey v. Owen*,¹ the same
 learned judge, then Baron Parke, says : “ The right to have the
 “ stream to flow in its natural state without diminution or
 “ alteration is an incident to the property in the land through
 “ which it passes ; but flowing water is *publici juris*, not in the
 “ sense that it is *bonum vacans*, to which the first occupant may
 “ acquire an exclusive right, but that it is public and common in
 “ this sense only, that all may reasonably use it who have a
 “ right of access to it, that none can have any property in the
 “ water² itself except in the particular portion which he may
 “ choose to abstract from the stream and take into his possession,
 “ and that during his possession only : see 5 B. & A. 24. But
 “ each proprietor of the adjacent land has the right to the
 “ usufruct of the stream which flows through it.”³

It would appear, therefore, that the ownership of the bed of a watercourse, not being the natural foundation of the right to the use of the water, the grantee of lands through which there was a watercourse would have the full use of the water therein, although the bed of the watercourse were reserved to the grantor.

The natural and acquired rights to the use of water are fully treated of in subsequent chapters.⁴ It is proposed in the present chapter to consider the rights of property in the bed of water-

¹ 6 Ex. 369.

² Except by statute ; see *Medway Co. v. Earl of Romney*, 9 C. B., N. S. 575 ; 30 L. J., C. P. 236 ; 4 L. T. 89 ; see *post*, Chap. III.

³ See also judgment of Leach, V.-C., in *Wright v. Howard*, 1 S. & St. 190 ; 24 R. R. 169 ; and *Mason v. Hill*, 5 B. & A. 1 ; 39 R. R. 354.

⁴ See Chaps. III. and IV. *post*.

courses, apart from the use of the water. The subject will be best treated of under the following heads :—

1. Tidal Navigable Rivers ;
2. Private Rivers and Streams ;
3. Lakes and Pools ;
4. Artificial Watercourses.

Tidal Navigable Rivers.

A public navigable river is a river which is actually navigable, and in which the tide ebbs and flows ; all other rivers on which navigation is carried on are private rivers over which the public have acquired a right or easement of navigation.¹ Definition.

The bed of all navigable rivers where the tide flows and reflows,² and of all estuaries and arms of the sea³ is by law vested *primâ facie* in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any way so as to derogate from or interfere with the right of navigation which belongs by law to the subjects of the realm,⁴ or the right of fishery, which is *primâ facie* common to all.⁵ Ownership of soil of bed.

Much discussion has arisen both in this country and in America, whether or not this ownership of the Crown and the public rights above stated are confined to tidal rivers, or whether they may also exist in non-tidal rivers which are in fact navigable, and have been used for the purposes of commerce from time immemorial. In America the Courts of some of the States have adopted one rule and some the other, the decision of the question appearing to depend much on the magnitude of the river in question.⁶ In this country a series of modern decisions has at last settled the law, and confined the rights of the Crown and of the public to tidal waters. Rights of the Crown confined to tidal waters.

¹ The word navigable in a legal sense, as applied to a river in which the soil *primâ facie* belongs to the Crown and the fishing to the public, imports that the river is one in which the tide ebbs and flows : *Murphy v. Ryan*, Ir. R., 2 C. L. 143 ; *Ilchester v. Rashleigh*, 5 T. L. R. 739 ; 61 L. T. 477 ; see also *Bloomfield v. Johnson*, Ir. R., 8 C. L. 63 ; and per Whiteside, C. J., in *Bristowe v. Cormican*, Ir. R., 10 Ch. 434.

² The word tide is not confined to salt water, but includes the fresh water ponded back : *R. v. Smith*, 2 Doug. 441 ; *Hume v. M'Kenzie*, 6 Cl. & F. 628. See however *Reece v. Miller*, *post*, p. 66.

³ See *ante*, p. 15.

⁴ *Mayor of Colchester v. Brooke*, 7 Q. B. 339 ; *Williams v. Wilcox*, 8 A. & E. 337 ; 47 R. R. 595 ; *Carter v. Murcott*, 4 Burr. 2163 ; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192 ; *Malcolmsen v. O'Dea*, 10 H. L. 593 ; *Lord Advocate v. Hamilton*, 1 Macqueen, H. L. 47 ; *Seckristo v. East India Co.*, 10 Moo. P. C. 140 ; see Hale de Jure Maris, p. 1.

⁵ *Malcolmsen v. O'Dea*, 10 H. L. 593 9 L. T. 93.

⁶ See Houck, p. 26 ; Angell on Water courses, c. 13, and per Dowse, B., in *Bristowe v. Cormican*, Ir. R., 10 C. L. 68 ; and per Lord Hatherley in *Lyon v. Fishmongers' Co.*, 1 App. C. 662.

In the case of *Murphy v. Ryan*,¹ in which an action was brought for trespass to a fishery in a non-tidal part of a navigable river, and defendant pleaded that the river was a royal river, and the right of fishery was in the public, on demurrer to this plea, O'Hagan, J., delivering the judgment of the Court, held that above the flux and reflux of the tide, the soil and fishing of rivers was vested *primâ facie* in the riparian owners, and not in the Crown and the public, and this none the less because the river was navigable, and had been immemorially navigated for commercial and other purposes.

In *Hargreaves v. Diddams*,² and *Musset v. Burch*,³ the Court of Queen's Bench have held, that where a river above the tide is made navigable by Act of Parliament, which does not expressly touch the rights of the riparian owners, none of the incidents attaching to a navigable river, up to the flow and reflow of the tide, can properly attach; and that, therefore, a claim by one of the public to fish there cannot exist in law. In the case of *Pearce v. Scotcher*⁴ the Queen's Bench Division have fully adopted the law as laid down in *Murphy v. Ryan* and held that there can be no public right of fishery in non-tidal waters even where an immemorial usage has been proved. So it has been held in *Reece v. Miller*⁵ that in the part of a navigable river where the water was not salt and in ordinary tides unaffected by any tidal influence, though upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water and caused it upon those occasions to rise and fall with the flow and ebb of the tide, no public right of fishing could exist.

In *Bristowe v. Cormican*,⁶ the House of Lords held that the Crown has no *de jure* right to the soil or fisheries of inland non-tidal lakes, Lord Blackburn thus stating the law: "The property
" in the soil of the sea, and of estuaries and of rivers, in which
" tide ebbs and flows, is *primâ facie* of common right vested in
" the Crown; but the property of dry land is not of common
" right in the Crown. It is clearly and uniformly laid down in
" our books, that where the soil is covered with the water forming

¹ Ir. R., 2 C. L. 143.

² L. R., 10 Q. B. 527; 44 L. J., M. C. 178; 32 L. T. 600.

³ 35 L. T., N. S. 486; see also *Hudson v. McRae*, 4 B. & S. 585; 33 L. J., M. C. 65.

⁴ 9 Q. B. D. 162; see also *Smith v.*

Andrews, (1899) 2 Ch. 678.

⁵ (1882) 8 Q. B. D. 626; 51 L. J., M. C. 64; see also *Hindson v. Ashby*, (1896) 2 Ch. 1, per Lindley, L. J., at p. 9.

⁶ 3 App. C. 641.

"a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land, and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake."¹ Again, in *Orr Ewing v. Colquhoun*, where it is laid down by the House of Lords that the public, who have acquired by user the right to navigate on an inland non-tidal water, have no right of property in the bed—Lord Blackburn observes, that the right of the Crown as regards the soil of the *alveus*, and of the public to navigate, are not the same in such a river as they are in the sea or in a tidal estuary.² It may now therefore be said to be clear law, that up to the point where the tide ebbs and flows in a navigable river, the soil is *primâ facie* in the Crown; and, above that point, whether in rivers navigable or not, the soil is presumed to belong to the riparian owners to the middle line of the stream.³

Though the flux and reflux of the tide is *primâ facie* evidence that a river is navigable, it does not necessarily follow, that because the tide flows and reflows in any particular place, it is therefore a public navigation, although of sufficient size. The strength of the evidence arising from the flux and the reflux of the tide, must depend on the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purpose of commerce, it will be natural to conclude that it has been a public navigation; but if it is a petty stream navigable only at certain states of the tide, and then only for a short time, and by very small boats, it is difficult to suppose that it has ever been a public navigable channel.⁴ It is more reasonable to hold that navigable is a relative and comprehensive term containing within it all such rights upon the water way as with relation to the circumstances of each river are necessary for the full and convenient passage of vessels and boats along the channel.⁵

What is
evidencethat
a river is
navigable.

¹ 3 App. C. 666.

² 2 App. C. 839; see also per Lord Selborne in *Lyon v. Fishmongers' Co.*, 1 App. C. 682; and *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68.

³ See *Bickett v. Morris*, L. R., 1 Sc. App. 47; 14 L. T. 835.

⁴ *Rea v. Montague*, 4 B. & C. 598; 28 R. R. 420; *Ilchester v. Rashleigh*, 5 T. L. R. 739; 61 L. T. 477; see also *Mayor of Lynn v. Turner*, 1 Cowp. 36; *Rose v.*

Miles, 5 Taunt. 705; 15 R. R. 623. For definition of a navigable river according to the French law existing in Canada, see *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.); 49 L. J. P. C. 1; according to American law, see Angell on Watercourses, ch. 13; and as to the distinction between "navigable" and "boatable."

⁵ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

The actual user of a tidal river, for the purposes of navigation, is of course the strongest evidence of its navigability.¹ From this it follows that, whenever a river ceases to be navigable either by natural causes, such as the silting up of the channel, or by virtue of Act of Parliament, or by order of Commissioners of Sewers, or by the writ *ad quod damnum*, and an inquisition found thereon by a jury, the public right of navigation will cease, at any rate till the obstruction be removed;² the public right will not, however, be barred by an artificial obstruction which has existed for more than twenty years.³ Where a river was formerly navigable, but became silted up, and by Act of Parliament power was given to commissioners to restore the navigation, and they were authorized to make and made a new cut, the navigation of which was to be open to the public on payment of tolls; it was held that the new cut was a public navigable river, the obstruction of which was an indictable nuisance, and that the public had the same rights over it as over the original stream.⁴

Limits of the property of the Crown.

The right of the Crown to the *alveus* of navigable rivers is limited to the line of ordinary high water mark, as is the case on the sea shore, and the adjoining land beyond this line is presumed to belong to the adjoining owners.⁵ It has been held that the word tide is not confined to salt water, but includes the fresh water ponded back;⁶ but in the case of *Reece v. Miller*,⁷ which was a claim by the public to fish in a navigable river at a place where the water was not salt and unaffected by any tidal influence in ordinary tides, though upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water and caused it on those occasions to rise and fall with the flow and ebb of the tide, the *locus in quo* was held not to be tidal within the meaning of the rule of law, which gives the public the right to fish in navigable tidal rivers.⁸ This line is clearly liable from natural causes

¹ *Miles v. Rose*, 5 Taunt. 705; 15 R. R. 623; see per Bayley, J., in *Foight v. Winch*, 2 B. & Ald. 662; 21 R. R. 446.

² *H. v. Montague*, 4 B. & C. 598; 28 R. R. 420. See also *R. v. Douglas*, 2 Lord Keny. 499, and Woolrych on Waters, p. 237.

³ *Foight v. Winch*, 2 B. & Ald. 662; 21 R. R. 446.

⁴ *Reg. v. Betts*, 16 Q. B. 1022; 19 L. J. Q. B. 531.

⁵ See *ante*, p. 14.

⁶ *R. v. Smith*, 2 Doug. 441.

⁷ 8 Q. B. D. 626; 51 L. J., M. C. 647.

⁸ Upon an issue whether certain defendants had wrongfully fished for salmon by means of stake-nets, placed in a situation prohibited by statute, where the question was, what was to be considered "river," and what "sea," a direction that the "thing to be looked to is the fact of the absence or prevalence of the fresh water, though strongly impregnated with salt," is erroneous.

The mouth of a river comprehends the whole space between the lowest ebb

to a shifting of position from time to time:¹ if the alteration take place by imperceptible degrees, the boundary, as between the Crown or its grantees and the adjoining owners, will follow the line, whether it gain upon the land or not; but if the new position be taken suddenly, whether in advance or recession, the old line continues to be the boundary between the territory of the Crown and that of the shore proprietors.²

Following this principle, it would appear that where a tidal river gradually and imperceptibly changes its course, the Crown will remain the owner of the bed; but where the change is sudden and perceptible, or where by the irruption of the waters of a tidal river an entirely new channel is formed in the land of a subject, the right to the soil of the new channel remains as before in the subject.

Where a river changes its course.

This point was raised in the case of *The Mayor of Carlisle v. Graham*,³ which was an action for trespass to plaintiffs' several fishery in the navigable tidal river Eden. It appeared that about the year 1698 the river began to leave its former bed where plaintiffs' fishery was situate, and to flow down a channel which was formerly a ditch on the land of the Earl of Lonsdale, under whom defendants claimed. The plaintiffs claimed to have the several fishery in the new channel, but the Court held, following *Murphy v. Ryan*,⁴ that the right of the Crown to grant a several fishery in a tidal river depends on its proprietorship of the bed, and that the bed in this case remained, as before, the property of the former owner. Kelly, C. B., delivering the judgment of the Court, says: "All the authorities ancient and modern are uniform to the effect that, if by the irruption of the waters of a tidal river, an entirely new channel is formed in the land of a subject, although the rights of the Crown and of the public may come into existence, and be exercised in what has thus become a portion of a tidal river, the right to the soil remains in the owner, so that if at any time thereafter the waters should recede and the river again change its course, leaving the new channel dry, the soil becomes again the exclusive property of the owner, free from all rights whatsoever in the Crown or in the public."⁵

and the highest flood mark: *Horne v. Mackenzie*, 6 Cl. & F. 628; 49 R. R. 162.

21 L. T. 133.

⁴ Ir. R., 2 C. L. 68.

¹ See *ante*, p. 14.

² Phear, p. 43. See *ante*, pp. 29 *et seq.*

³ L. R., 4 Ex. 361; 38 L. J. Ex. 226;

⁵ See also Hale de Jure Maris, pp. 5, 6, 11, 13, 16, 37, and *Reg. v. Betts*, 16 Q. B. 1022.

Ford v. Lacy. In the case of *Ford v. Lacy*¹ a question arose as to the ownership of some land on the river Lea; and though it appears that the river in the *locus in quo* was not navigable, the principles involved in the decision of the case would seem nevertheless to apply to land on navigable rivers as well. It was proved that formerly the river was the boundary of the two counties Middlesex and Essex; but that the bed was wholly in Essex. The piece of land in question was a narrow strip on the Middlesex side of the river, extending from the river to some posts, and had formerly been part of the bed of the river. The plaintiff, the owner of a farm on the Essex side, had exercised rights of ownership over the land claimed since 1814. Vicarial tithes had been taken for the parish of Waltham, in Essex, and it had been rated to the said parish. The defendant occupied land adjoining the land claimed, and proved an award under the Inclosure Act, 1804, by which all the land up to the river was allotted to his landlord. The learned judge at the trial asked the jury—1st. Whether the pieces of land in question were in Essex; 2nd. Whether they were in the parish of Waltham; 3rd. Whether they were in possession of plaintiff; 4th. Whether they were the property of defendant's landlord. The jury found for the plaintiff. On motion for a new trial—on the ground that the learned judge should have directed the jury that land left by a river becomes part of the adjoining property and county—the rule was refused; the Court approving of the doctrine laid down by Lord Hale,² that if the change was sudden and perceptible, and if the former marks remained, and the extent could reasonably be ascertained, the soil remains in the former owner; and Pollock, C. B., remarking in the course of the argument that, if for fifty years the land had been treated as part of Essex, it must be presumed that the water had receded suddenly.

*Foster v.
Wright.*

In the late case of *Foster v. Wright*³ the question as to the ownership of the bed of a river which had gradually and imperceptibly changed its course was raised and fully discussed. The plaintiff was lord of a manor under grants from the Crown, giving him the right of fishing in all the waters of the manor. Some manor land near, but not adjoining, a river in the manor, was enfranchised and became the property of the defendant. Subsequent to this enfranchisement the manor was forfeited to

¹ 7 H. & N. 151; 30 L. J. Ex. 351.

² See p. 69, note 5.

³ 4 C. P. D. 438; 49 L. J. C. P. 97.

the Crown, but was regranted with free liberty of fishing in all its waters. The river, which then ran wholly within lands of the plaintiff, afterwards wore away its bank, and by gradual progress, not visible but periodically ascertained, during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river. The extent of the encroachment could be defined and identified. An action of trespass was brought by the plaintiff against the defendant for fishing on this strip of land covered with water. The Court held that the action would lie on the ground that at the time of the grant, and of the regrant of the manor, the whole of the bed of the river, and of the exclusive right of fishing therein, was the property of the plaintiff; and that this property in the bed was not lost by the gradual and imperceptible change of the bed, although the former boundaries could be ascertained. Lindley, J., delivering the judgment of the Court, says: "Since the regrant of the manor, "the course of the river between the points above referred to has "gradually changed: its bed has gradually approached nearer and "nearer to the defendant's land; and now some portion of that land "has become part of the river bed. This part can still be identified, "and its boundary can be ascertained. The question we have "to determine is, whether the plaintiff's exclusive right of fish- "ing extends over so much of the water as flows over land which "can be identified as formerly part of the defendant's property. "I am of opinion that it does. The change of the bed of the "river has been gradual; and although the river bed is not now "where it was, the shifting of the bed has not been perceptible "from hour to hour, from day to day, from week to week, nor in "fact at all, except by comparing its position of late years with "its position many years before. Under these circumstances, I "am of opinion that, for all purposes material to the present "case, the river has never lost its identity, nor its bed its legal "owner. Gradual accretions of land from water belong to the "owner of the land gradually added to: *Rex v. Yarborough*; ¹ "and, conversely, land gradually encroached upon by water "ceases to belong to the former owner: *In re Hull and Selby* "Rail. Co.² The law on this subject is based upon the "impossibility of identifying from day to day small additions "to or subtractions from land caused by the constant action of "running water. The history of the law shows this to be the

¹ 3 B. & C. 91; 5 Bing. 163; 27 R. R. 292.

² 5 M. & W. 327.

“ case. Our own law may be traced back through *Blackstone*¹ “ *Hale*,² *Britton*,³ *Fleta*,⁴ and *Bracton*,⁵ to the *Institutes of Justinian*,⁶ from which *Bracton* evidently took his exposition of “ the subject. Indeed, the general doctrine, and its application “ to non-tidal and non-navigable rivers in cases where the old “ boundaries are not known, was scarcely contested by the “ counsel for the defendant, and is well settled: see the authorities above cited; but it was contended that the doctrine does “ not apply to such rivers where the boundaries are not lost; and “ passages in *Britton*,⁷ in the *Year Books*,⁸ and in *Hale de Jure Maris*,⁹ were referred to in support of this view. *Ford v. Lacy*¹⁰ “ was also relied upon in support of this distinction. *Britton* “ lays down as a general rule that gradual encroachments of a “ river enure to the benefit of the owner of the river; but he “ qualifies this doctrine by adding, ‘if certain boundaries are “ ‘not found.’ The same qualification is found in 22 Ass. pl. “ 93, which case is referred to in *Hale*, *ubi supra*. But, curiously “ enough, this qualification is omitted by *Callis* in his statement “ of the same case: see *Callis*, p. 51; and, on its being brought “ to the attention of the Court in *Re Hull and Selby Rail. Co.*,¹¹ “ the Court declined to recognize it, and treated it as inconsistent “ with the principle on which the law of accretion rests. Lord “ Tenterden’s observations in *Rex v. Yarborough*¹² are also in “ accordance with this view; and, although Lord Chelmsford in “ *Attorney-General v. Chambers*¹³ doubted whether, where the “ old boundaries could be ascertained, the doctrine of accretion “ could be applied, he did not overrule the decision of *In re “ Hull and Selby Rail. Co.*,¹⁴ which decided the point so far as “ encroachments by the sea are concerned.

“ Upon such a question as this, I am wholly unable to see any “ difference between tidal and non-tidal or navigable or non- “ navigable rivers; and Lord Hale himself says there is no “ difference in this respect between the sea and its arms and “ other waters: *De Jure Maris*, p. 6. The question does not “ depend on any doctrine peculiar to the royal prerogative, but “ on the more general reasons to which I have alluded above.

¹ Vol. ii. c. 16, pp. 261, 262.

² *De Jure Maris*, cc. 1, 6.

³ Book ii. c. 2.

⁴ Book iii. c. 2, ss. 6, &c.

⁵ Book ii. c. 2.

⁶ Inst. ii. 1, 20.

⁷ *Ubi supra*.

⁸ 22 Ass. p. 106, pl. 93.

⁹ Book i. c. 1, citing 22 Ass. pl. 93.

¹⁰ 7 H. & N. 151.

¹¹ 5 M. & W. 327.

¹² 3 B. & C. 106; 27 R. R. 292.

¹³ 4 De G. & J. 69—71.

¹⁴ 5 M. & W. 327.

"In *Ford v. Lacy*,¹ the ownership of the land in dispute was "determined rather by the evidence of continuous acts of "ownership since the bed of the river had changed, than by "reference to the doctrine of gradual accretion, and I do not "regard that case as throwing any real light on the question I "am considering."²

In the case of *Hindson v. Ashby*³ the plaintiffs, under an inclosure award made in 1803, were entitled to a piece of land at Wraysbury bounded on one side by the Thames, which is there navigable but not tidal. The land ended in an almost perpendicular bank five or six feet high, and the bed of the river reached to its foot, the water often reaching some height above the foot. The defendant was entitled to a several fishery in the river and to the bed of the river. The water of the river, owing to the removal of a weir, sank, and at the foot of the bank a deposit took place forming a strip on which some large trees grew, and which during some part of the year was left dry, but it was overflowed during a considerable part of the year. At the foot of the bank the defendant dug a ditch which he regularly cleaned out for more than twelve years, and afterwards filled up with concrete so as to make a footpath. The plaintiffs brought an action for an injunction to restrain him from trespassing, and it was held by Romer, J., that whether the strip had ceased to be part of the bed of the river was a question to be determined, not by any hard and fast rule, but regarding all the material circumstances of the case, including the fluctuations of the river, the nature of the land, and its growths and uses, and that, in the present case, the strip had ceased to be part of the bed and belonged to the plaintiffs as having been formed by gradual accretion.

The Court of Appeal, however, held that, though the principle on which Romer, J., had proceeded in determining whether the strip was part of the bed of the river was sound, on the facts the strip had not ceased to form part of the bed, and therefore belonged to the defendant; but that when it was dry the rights of the plaintiffs as riparian proprietors were not affected, and they had right of access over it to the water, and could use it to the same extent as they could use the bed of the river in its old state.

¹ 7 H. & N. 151.

² See *A.-G. v. Reece*, 1 T. L. R. 675, Q. B. D., *ante*, p. 30; *Whithers v. Pur-*

chase, 60 L. T. 819, and *post*, p. 101.

³ (1896) 2 Ch. 1.

The judgment of Lindley, L. J., in the Court of Appeal is of importance not only with regard to the law as to accretions, but as explaining the law generally as to the rights of riparian owners and owners of the beds of rivers.

"The owners of the allotment made in 1803 were clearly riparian proprietors, and the river being a public navigable river they had a right as members of the public to use the river as a public highway. They had also as riparian proprietors the right to pass to and fro between the water and their own land, and to pull their boats up from the water on to their own land, and to push them down again from their own land into the water. They had also as riparian proprietors the right to take water from the river provided they did not injure others by so doing. These rights, at least, the allottees acquired, and to these rights, at least, the plaintiffs are now entitled: see *Lyon v. Fishmongers' Co.*¹ The right of navigating a non-tidal river does not, however, entitle the public to fish in it: see *Smith v. Andrews*,² and the authorities there cited."

"But, further, it must be taken as now settled that, if the right to a several fishery in a public navigable river is proved to exist, the owner of the fishery is to be presumed to be also the owner of the soil over which his fishery extends, unless there is evidence to the contrary. The reasoning on which this presumption is based is not satisfactory, and the difficulties involved in it were very forcibly pointed out by Cockburn, C. J., in *Marshall v. Ulleswater Steam Navigation Co.*; ³ but the presumption is supported by Mr. Butler in his note to Coke upon Littleton; ⁴ and it has the great authority of Bayley, J. and the other judges who decided the *Duke of Somerset v. Fogwell*; ⁵ it was deliberately sanctioned by the Court of Queen's Bench and by the Exchequer Chamber in *Holford v. Bailey*; ⁶ it was recognised as law and was acted upon as such by Cockburn, C. J., himself and by his colleagues in *Marshall v. Ulleswater Steam Navigation Co.*; ⁷ and lastly it was treated by the House of Lords in *Attorney-General v. Emerson* ⁸ as no longer open to question. But treating this presumption as established, what does it involve? Is the owner of a several fishery to be treated as if he were the grantee of a defined strip of land,

¹ 1 App. Cas. 662.

² (1891) 2 Ch. 678.

³ 3 B. & S. 746.

⁴ 122 a.

⁵ 5 B. & C. 875; 29 R. R. 449.

⁶ 3 Q. B. 1000; 13 Q. B. 426.

⁷ 3 B. & S. 746.

⁸ (1891) A. C. 649.

“with all subjacent mines and minerals? Or is his presumed ownership of the soil to be limited to the right to make such a use of it as is necessary for the purposes of his fishery? Are the limits of his soil fixed by metes and bounds, or do they change as the bed of the river changes? Again, what are his rights as regards riparian owners? What as regards accretions to the banks or to the bed of the river? And what are his rights as regards soil from which the bed of the river has permanently receded? The answer to all these questions must depend primarily on the real meaning of the doctrine under consideration, and on the extent to which the owner of a several fishery is to be treated as the owner of the bed of the river within the limits of his fishery; and on this subject there is as yet very little authority in our books. *Scrutton v. Brown*¹ is a very important authority to show that water boundaries of land may fluctuate in law as well as in fact. In *Foster v. Wright*² it was decided that the owner of a several fishery had the exclusive right to fish in a river which had gradually encroached upon and into the land of a riparian proprietor, the limits of which land were known. This decision was, in my opinion, quite right, although in one part of my judgment I may perhaps have gone too far. I am not, however, satisfied that I did, for in that case the river was the boundary. In the *Mayor of Carlisle v. Graham*³ it was held that the owner of a several fishery, in a part of the river which had been permanently left dry, had no right to fish in an entirely new channel which the river had made for itself in quite a different place. No such questions arise here; but these cases are useful as throwing some light on the rights of owners of several fisheries.”⁴ As to *accretions* he says:⁵ “Whether, apart from the Statute of Limitations, the accretions, or the land left by the water, can become the property of the plaintiffs or cease to be the property of the defendant is a question of considerable difficulty, and one which, in my view of the facts, it is not now necessary to decide. Passages were cited from Bracton, Britton, Fleta, and Hale de Jure Maris, c. i. and vi., and the Year Book, 22 Ass. fo. 106, pl. 93, to show that the doctrine of accretion does not apply where boundaries are well defined and known.

¹ 4 B. & C. 485; 28 R. R. 344.

² 4 C. P. D. 438.

³ L. R., 11 Ex. 361.

⁴ (1896), 2 Ch. p. 10.

⁵ *Ibid*, p. 13.

"This may be if the boundary on the waterside is a wall or something so clear and visible that it is easy to see whether the accretions, as they become perceptible, are on one side of the boundary or on the other. But I am not satisfied that the authorities referred to are applicable to cases of land having no boundary next flowing water, except the water itself. The cases of *Rex v. Lord Yarborough*,¹ affirmed by the House of Lords in *Gifford v. Lord Yarborough*,² and *In re Hull and Selby Rail. Co.*,³ seem opposed to these authorities if applied to fluctuating water boundaries. The judgments in *Scrutton v. Brown*⁴ point in the same direction. On the other hand, *Attorney-General v. Chambers*⁵ seems the other way. But it is unnecessary to dwell more on this question, and I leave it for reconsideration and decision when it shall arise."

Bed of a public navigable river is presumably within the county.

A public navigable river, *intra fauces terre*, where a man may reasonably discern between shore and shore, it has been said by Lord Hale, is or may be within the body of a county;⁶ and will thus be subject to the jurisdiction of the justices of the county, and of the Common Law, except in the cases of murder, and mayhem done in great ships, where formerly the admiral,⁷ and now the Central Criminal Court, has a concurrent jurisdiction with the Courts of Common Law.⁸ The shore between high and low water mark on rivers and estuaries is within the exclusive jurisdiction of the justices of the adjoining county, whether the offence be committed when the shore is or is not covered with water.⁹

Not presumably within the parish.

The bed and shore of a public navigable river does not, in the absence of evidence, form part of the adjoining parish, but is *primâ facie* extra-parochial.¹⁰ Evidence may be given to show that it is within the parish.¹¹ Now, however, by 31 & 32 Vict. c. 122, s. 27, every accretion of the sea, whether natural or artificial, and the part of the sea shore to the low water mark, and the bank of every river to the middle of the stream, which at the date of the Act were not incorporated with any parish, are,

¹ 3 B. & C. 91.

² 5 Bing. 163; 27 R. R. 292.

³ 5 M. & W. 327.

⁴ 4 B. & C. 485, 499, 502, 505; 28 R. R. 344.

⁵ 4 De G. & J. 55, 71.

⁶ De Jure Maris, Harg. Tracts, p. 10; Ow. 122; see also Cockburn, C. J., in *Reg. v. Keyn*, 2 Ex. D. 164.

⁷ Stat. 15 Ric. II. c. 3.

⁸ 4 & 5 Will. IV. c. 36; *Reg. v. Keyn*, *supra*.

⁹ *Embleton v. Brown*, 3 E. & E. 224; *Reg. v. Musson*, 8 E. & B. 900; 27 L. J., M. C. 100.

¹⁰ *Reg. v. Musson*, *supra*; *Duke of Bridgewater v. Bootle - cum - Linacre*, L. R., 2 Q. B. 4.

¹¹ *Reg. v. Musson*, *supra*; *Cory v. Bristow*, 2 App. C., H. L. 262; 46 L. J., M. C. 273; 36 L. T. 595; *M'Cannon v. Sinclair*, 2 E. & E. 53; *R. v. Landulph*, 1 Moo. & Rob. 393; 42 R. R. 812.

for all civil parochial purposes, annexed to and incorporated with the next adjoining parish with which it has the longest common boundary.

The word "*bank* of every river to the middle of the stream" is somewhat misleading—one would have expected "*bank and bed*"—but it is impossible to construe the words as other than meaning "*bank and bed*." The word "*rivers*" clearly includes "*tidal rivers*," and consequently by this Act the whole of the bed of such rivers is incorporated with the adjoining parishes. It is now the practice of the Ordnance Survey Department, in fixing parochial boundaries on tidal rivers to include in the adjoining parishes the bed of such rivers *ad medium filum aque* down to the point where the river enters the sea level at low water mark.

It may, therefore, be presumed that where a tidal river forms the boundary of two counties, the boundary line of the two counties will pass through the centre of the stream, though this presumption may be rebutted; but that where it forms the boundary between two parishes, the presumption is that the bed up to high water mark is extra-parochial, except for certain statutory purposes.¹

¹ The subject of the rights of different nations whose territories are washed by the same river, is one connected with international law, and does not, therefore, properly fall within the scope of this work. It may, however, be of interest to the reader to note some points with regard to it.

The territory of a State includes the lakes, seas, and rivers entirely inclosed within its limits. . . . Where a navigable river forms the boundary of continuous States, the middle of the channel or *thalweg* is generally taken as the line of separation between the two States, the presumption of law being, that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long-undisturbed possession giving to one of the riparian proprietors the exclusive title to the entire river. (Wheaton, Elements of International Law, p. 346; Wheaton, Law of Nations, pp. 577—583.)

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor; this is what is called an innocent use. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits

and other arms of the sea leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating for commercial purposes a river which flows through the territories of different States, is common to all nations inhabiting the different parts of its banks; but this right of innocent passage being what text writers call an imperfect right, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise. (Grotius de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 12, 14; Vattel, Droit des Gens, liv. ii. ch. 9, ss. 126—130; ch. 10, ss. 132—134; Puffendorf de Jur. Naturæ et Gentium, lib. iii. cap. 3, ss. 3—6; Wheaton, Elements of International Law, pp. 346, 347.)

It seems this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself—*e.g.*, according to Roman law, right to use of shore to moor, to lade and unlade,

International rights on rivers forming boundary between two States.

Property of
Crown in the
bed may be

The property of the Crown in the soil of tidal navigable rivers may be communicated to a subject in the same way as may the

incident to right to navigate; and public jurists apply this principle to the same case, between nations.

These rights are imperfect, and can be modified by compact. Cf. the case of the navigation of the Scheldt, and of the rivers whose navigation was regulated by the Treaty of Vienna, 1815, Neckar, Mayne, &c. (Wheaton's Elements of International Law, pp. 347, 348.)

By Treaty of Vienna, 1815, the commercial navigation of rivers which separate different States, or flow through their respective territories, was declared to be entirely free in their whole course from the point where each river becomes navigable to its mouth; provided that the regulations relating to the police of the navigation should be observed, which regulations were to be uniform, and as favourable as possible to the commerce of all nations. (Wheaton's Elements of International Law, pp. 348, n., *et seq.*) Cf. also the case of the navigation of the Rhine, p. 350, the case of the navigation of the Mississippi, pp. 352 *et seq.*, the case of the navigation of the St. Lawrence, pp. 356 *et seq.*, the case of the navigation of the Plata and Parana rivers, p. 360, n. 1; and see the discussion as to the freedom of navigation of the Amazon, which took place between the United States and Brazil, and the arguments thereon. (*Ibid.*)

TREATY OF VIENNA, 1815. June 9th (extracted from Hertzselt's Collection of Treaties, vol. i. pp. 3, 5, 15, 16.)

General Treaty signed in Congress at Vienna, 9th June, 1815, and since acceded to by all the other powers of Europe.

Art. 108.—The powers whose States are separated or crossed by the same navigable river, engaged to regulate, by common consent, all that regards its navigation. For this purpose they will name commissioners, who shall assemble, at latest, within six months after the termination of the congress, and who shall adopt, as the basis of their proceedings, the principles established by the following articles.

Art. 109.—The navigation of the rivers along their whole course, referred to in the preceding article, from the point where each of them becomes navigable to its mouth, shall be entirely free, and shall not, in respect to commerce, be prohibited to any one: it being understood that the regulations established

with regard to the police of this navigation shall be respected; as they will be framed alike for all, and as favourable as possible to the commerce of all nations.

These articles provided, besides, for the liberty of navigation, a uniform system for the collection of duties, and for the maintenance of police, as well as for regulations as to tariff, the establishment of offices for the collection of duties, custom houses, and the repair, &c. of towing paths. Harbour duties were prohibited, and such as existed were to be preserved for such time only as was necessary for navigation. Everything in the articles was to be settled by a general arrangement, which being once settled was not to be changed.

With regard to towing paths, each State bordering on the rivers shall be at the expense of keeping in good repair those passing through its territory, and of maintaining the necessary works through the same extent in the bed of the river, in order that no obstacle may be experienced in the navigation.

The intended regulation was to determine the manner in which States bordering on rivers were to participate in these latter works, where opposite banks belonged to different Governments.

The principles laid down in this treaty were those suggested in a memoir by Baron Von Humboldt, plenipotentiary of Prussia, and presented on the 3rd February, 1815. *Inter alia*, he states that, "In order to conciliate the interests of commerce with those of the riparian State, it would be necessary, on the one hand, that every regulation indispensable to the freedom of navigation from the point where a river becomes navigable, to its mouth, should be adopted by common consent, in a convention subject to be altered only by the unanimous consent of the parties: and on the other hand, that no riparian State should be disturbed in the exercise of its rights of sovereignty in respect to commerce and navigation beyond the stipulations of this convention, and at the same time should be entitled to its share of the net revenues collected upon the navigation in proportion to the extent of its territory along the banks of the river. It would be necessary to establish upon those bases principles so general that the difference in

property in the sea shore, and may be claimed by a subject granted to a subject. either in gross or as parcel of an adjoining manor. The grantees

"localities should only require modifications in their detailed application." (Wheaton. History of the Law of Nations, p. 499.)

These principles have been applied by detailed convention to regulate the navigation of the Rhine, Scheldt, Meuse, Moselle, Elbe, Oder, Weser, and the Po, and their confluent rivers. (Ibid. p. 501.)

The principles established by the Congress of Vienna, and applied to the navigation of the great European rivers, had been long before asserted by the Government of the United States, in respect to the navigation of the Mississippi, at the time when both banks of that river for a considerable distance above its mouth were in possession of Spain. Since 1783, "when the whole navigable river was, by the Treaty of Paris of that year, declared open to the traffic of the two Powers (Great Britain and the United States) established on its banks," the right of navigating the Mississippi is now vested exclusively in the United States and their citizens. (Ibid. 506 *et seq.*)

"The right of the United States to participate with Spain in the navigation of the River Mississippi previously to the cession of Louisiana, was rested by the American Government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all riparian inhabitants. This natural right was found to be acknowledged and protected in all tracts of country united under the same political society, by laying the navigable rivers open to all the inhabitants of their banks. When these rivers enter the limits of another society, if the right of the upper inhabitants to descend the stream be in any case obstructed, it is an act of force by a stronger society against a weaker condemned by the judgment of mankind." (Ibid. p. 508.)

Cf. the account of discussion between American and British Governments as to the navigation of the St. Lawrence. (Ibid. 511 *et seq.*)

The Treaty of Paris, 1856, extended the principle of the Treaty of Vienna to the Danube (Art. 15 of the treaty of the 30th March), and furthermore declared that "this provision henceforth forms part of the public law of Europe," and the signatory Powers "take it under their guarantee." (Art. 15.) The general Act

of Berlin (26th February, 1885) applied the same principle as regards the Congo (Arts. 2—4 and 13—25), declaring that not only this river and its tributaries shall be open "to all flags, without distinction of nationality," but also all the lakes and ports situated on its banks, and the canals by which they or different parts of the river may be connected (Art. 2), and roads or railways which may supplement these means of communication. (Art. 16.) Similar provisions are made as regards the Niger (Arts. 26—33); and Arts. 25 and 23 of the general Act also provide for the neutralization of the Congo and Niger, traffic on which and on their tributaries is to remain free in spite of war, as well as on the territorial waters facing their estuaries, and the roads, railways, lakes, and canals above mentioned.

Territorial changes may convert an international into a national river, as in the case of the Mississippi above mentioned; but the rights acquired when it was free subsist in spite of the change, and the Po has thus remained international. (Cf. Encyclopædia of Laws of England, art. "Rivers, International.")

The right of navigating waters open to all includes the right of passing through straits which serve for communication between such waters.

"There is no reason," observes Mr. Ferguson (International Law, London, 1884, s. 91), "for not including in this general rule all canals or narrow straits connecting, for the benefit of outside and international navigation, two open and internationally free seas, although such a canal may be an entirely or partially artificial channel dug out for the said purpose, and passing entirely through the territory of one Power. The legal status of such a canal in the eye of international law is but the state it actually occupies in the intercourse of nations independent of its origin. Being once *de facto* established as an international highway, whether with or without tolls, the only concern of international jurisprudence regarding it is its *raison d'être*: This is exclusively the connection of two open seas. Such a highway having once been declared open to all nations can therefore not be legally closed again, except on the principles which govern all natural narrow passages between open seas." (See also Macdonell, "The Legal Position of the Dardanelles and the Suez Canal," *Fraser's Magazine*, May, 1878.)

Interoceanic
canals.

of the Crown, of course, take subject to all the public rights, and any grant of the Crown detrimental to the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right.¹

Theoretically this may seem true ; yet the rules applicable to artificial water-courses may, with equal reason, be held to differ from those applicable to natural watercourses, owing to the very fact that they are artificial, have come into existence at a determinate moment, and are dug upon territory over which the sovereign State has paramount dominion. In any case oceanic canals are considered in practice to form part of the territory they traverse, and it is only by treaty that the territorial authority abdicates any part of its sovereign power within its own frontiers.

No question has ever been raised in this connection except as regards the Suez Canal, which, from the immense saving of distance it has effected as compared with alternative maritime routes, could not be closed without an essential disturbance of the course of European trade with the East.

The Powers have therefore by a treaty signed at Constantinople, October 29th, 1888, by the representatives of Great Britain, Germany, Austria, Hungary, Spain, France, Italy, the Netherlands, Russia and Turkey, as the preamble thereto states, established "a definite system destined to guarantee at all times and for all the Powers the free use of the Suez Maritime Canal." The chief articles of this treaty are as follows :—

The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace. (Art. 1.) The maritime canal remaining open in time of war as a free passage, even to ships of war of belligerents, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and in its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers. Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly

necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission (*arrêt*) than that resulting from the necessities of the service. Their stay at Port Said and in the roadstead shall not exceed twenty-four hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the starting of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power. (Art. 4.) In time of war belligerent Powers shall not disembark nor embark, within the canal and its ports of access, either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal, men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material. (Art. 5.) The Powers shall not keep any vessel of war in the waters of the canal (including Lake Timsah and the Bitter Lakes). Nevertheless, they may station vessels of war in the ports of access of Port Said and Suez, the number of which shall not exceed two for each Power. This right shall not be exercised by belligerents. (Art. 7.) See Parl. Papers, C. 5,623 (1889).

The position of the proposed Central American Oceanic Canal, when it is completed, will probably be regulated in some similar way. The so-called Clayton-Bulwer Treaty, a convention relative to a ship canal by way of Nicaragua, Costa Rica, the Mosquito Coast, or any part of Central America, concluded April 19th, 1850, already determines that as between Great Britain and the United States no exclusive control over the canal shall be exercised by either Power (Art. 1); also provides for the guaranteeing of the neutrality of the canal (Art. 5), and for the entering of other States into similar stipulations. (Art. 6.)

Art. "Canals, Inter-oceanic," *Encyclopædia of Laws of England*, by J. S. Henderson, p. 349.

¹ *A.-G. v. Parmeter*, 10 Price, 378, 412, H. L.; 24 R. R. 723, 745; *Gann v. Free*

Such grants of the soil can now only be made by Act of Parliament.¹

It has been shown² that the shore of the sea between high and low water mark may form parcel of the adjoining manor, and may so pass by grant from the Crown to a subject. There would appear to be no distinction as to this between the shore of the sea and of tidal rivers.³ But as the soil of the bed of tidal rivers below low water mark is vested *primâ facie* in the Crown, independently of any ownership in the adjoining land, and as this ownership of the soil below low water mark may be granted to a subject, questions might arise as to the boundaries of such grants when the Crown is also owner of the adjoining land. A grant of lands on non-tidal waters, in the absence of evidence to the contrary, conveys the soil of the bed *usque ad medium filum aquæ*;⁴ and this, independently of the breadth of the stream.⁵ A grant of land by the Crown, bounded by a non-navigable creek of *Botany Bay*, has been held to pass the soil of the creek *ad medium filum aquæ*, as the description of the boundaries in the grant did not exclude from it that portion of the creek which, by the general presumption of the law, would go along with the ownership of the land on the banks of it; and as the same rules of common sense and justice must apply in the construction of a deed, whether the subject-matter of construction be a grant from the Crown or from a subject, and it being always a question of intention to be collected from the language used with reference to the surrounding circumstances.⁶ Following this principle, it would appear that as there is no presumption of law that the ownership of the bed of a tidal navigable river goes along with the ownership of the shore, a grant of lands by the Crown on the banks would *primâ facie* be bounded by the line of high water mark; but that, by evidence to that effect, it might be shown to include both the shore between high and low water mark and the bed below low water mark.

Limits of grants by the Crown on public navigable rivers.

A navigable river is a public highway navigable by all his

A navigable river is a public highway.

Fishers of Whitstable, 11 H. L. 192; see *ante*, p. 17. As to implied grants, &c., see *ante*, pp. 20 *et seq.*

¹ The liabilities of a foreshore owner under a statute may be limited like his powers: *London Port Sanitary Authority v. Thames Conservators*, (1894) 1 Q. B. 647; see *post*, Chap. VII.

² *Ante*, pp. 15—23.

³ See *Duke of Bridgewater v. Bootle-*

cum-Linacre, 1. R., 2 Q. B. 4; *Blundell v. Catteral*, 5 B. & Ald. 268; 24 R. R. 353.

⁴ See *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Bickett v. Morris*, 1 H. L. Sc. 47; *Wishart v. Wyllie*, 1 M. Q., H. L. 839.

⁵ *Dwyer v. Rich*, 1r. R., 4 C. L. 414.

⁶ *Lord v. Commissioners of Sydney*, 12 Moo. P. C. 473; 3 L. T. 1; see *ante*, p. 16.

Majesty's subjects in a reasonable way and for a reasonable purpose.¹ The public right of free passage extends to the whole of the navigable channel,² which it appears may be used as a highway by the public whenever it suits their convenience, whether such navigation be valuable or not.³ It includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels⁴—such as the right of stopping for a reasonable time to unload,⁵ and of grounding and anchoring free of toll,⁶ and of fixing moorings.⁷ The right of navigation is paramount to the right of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate or interfere with the public right of navigation;⁸ and any grant by the Crown which interferes with the public right is void as to such parts as are open to such objections, if acted upon so as to effect nuisance by working injury to the public right.⁹ The public right can only be abridged by Act of Parliament, by writ *ad quod damnum*, followed by an inquisition, or by natural causes—such as the recess of the sea, or the accumulation of soil or mud;¹⁰ in which case the river ceases to be navigable, at least until such causes are by some means counteracted.¹¹ Where a navigable river changes its bed, though the soil of the bed and the right of fishing may be vested in the owner of the adjoining land, it would appear that the right of navigation will follow to the new channel, —the test being whether the river remains tidal.¹² An artificial obstruction to a navigable river, though of more than twenty years' duration, will not operate as a bar to the public right.¹³

Obstructions
to navigation.

Rights of the
Crown and its
grantees in
the bed.

Any erection on the bed of a navigable river obstructing the navigation, even if erected by the authority of the Crown, is illegal, and is a public nuisance,¹⁴ and the subject of an indict-

¹ *Original Hartlepool Colliers v. Gibb*, 1 Ch. D. 713.

² *A.-G. v. Terry*, L. R., 9 Ch. 423; *Orr Ewing v. Culquhoun*, 2 App. C. 839; *Williams v. Wilcox*, 8 A. & E. 314; 47 R. R. 595.

³ *A.-G. v. Lonsdale*, L. R., 7 Eq. 377.

⁴ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁵ *Original Hartlepool Colliers v. Gibb*, 1 Ch. D. 713.

⁶ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

⁷ *A.-G. v. Wright*, (1897) 2 Q. B. 318.

⁸ *Ibid.*; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.

⁹ *A.-G. v. Parmeter*, 10 Price, 412;

24 R. R. 723, 745.

¹⁰ *Reg. v. Montague*, 4 B. & C. 598; 28 R. R. 420.

¹¹ *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

¹² *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 366; *Hale de Jure Mar.* pt. 1. c. 6, p. 34; *Rolle*, Abr. 390; *Roscoe*, Crim. Ev. p. 535.

¹³ *Tought v. Winch*, 2 B. & Ald. 662; 21 R. R. 446. As to *navigation*, see further *post*, Chap. VII.

¹⁴ *A.-G. v. Parmeter*, 10 Price, 412; 24 R. R. 723, 745; *A.-G. v. Burridge*, 10 Price, 350; 24 R. R. 705; *A.-G. v. Johnson*, 2 Wils. Ch. C. 87; 18 R. R. 156.

ment¹ and information,² and of an action on proof of special damage.³ Any unauthorized erection on the bed of a navigable river by any person other than the owner of the soil is a *purpresture*, and is, *per se*, illegal, even though it cause no actual obstruction to the navigation; though there may be cases of so trifling a nature that the Courts will not interfere by injunction to restrain or abate them.⁴ The question whether the owner of the soil of the bed of a navigable river may erect on the bed of the river works which cause no obstruction to the navigation, and no injury to the rights of the riparian owners, or whether such erections are illegal *per se*, is a question which has given rise to some apparently conflicting decisions; but it would now seem settled that such erections are not illegal in themselves, if they cause no actual or probable injury either to the public rights or to the adjoining riparian proprietors. The cases of *Bickett v. Morris*, and *Orr Ewing v. Colquhoun*, cited below, do not relate to tidal rivers; but as they define the rights of the owners of the beds of rivers generally, and state broadly the laws with regard to such rights, it is submitted that the principles established by them will apply, *mutatis mutandis*, to the Crown and its grantees, as owners of the bed of tidal navigable rivers.

In the case of *Menzies v. Breadalbane*,⁵ an embankment on the flood-channel of a river, which might have the effect of diverting the stream in times of flood, and throwing it upon the land of an opposite proprietor, has been held illegal, though it was intended to protect the lands of the owner who made it from the flood. But where a riparian proprietor erected a mound, not for the purpose of altering the old course of the river, but to prevent the old course from being altered, and so encroaching on his lands, there being also evidence to show that at least part of the mound was erected on old foundations, and that it was the custom of the country for proprietors so to embank, the Court held that the erection was legal.⁶

Where, however, an opposite proprietor complained of an erection in the *alveus* of the river, and was unable to prove that

*Menzies v.
Breadalbane.*

¹ *R. v. Grosvenor*, 2 Stark. 511; 20 R. R. 732.

² *A.-G. v. Richards*, 2 Anstr. 603; 3 R. R. 632.

³ *Rose v. Miles*, 4 M. & S. 101; 16 R. R. 405; *Bouth v. Ratté*, 15 App. Cas. 188; 62 L. T. 198; 59 L. J., P. C. 41; *Palmer v. Perse*, Ir. R., 11 Eq. 616; *Belfast Rope Works v. Boyd*, 21 L. R., Ir. 560 (C. A.).

⁴ *A.-G. v. Terry*, L. R., 9 Ch. 423; *R. v. Tindall*, 6 A. & E. 143; 45 R. R. 426; *Reg. v. Russell*, 3 El. & Bl. 942; 23 L. J., M. C. 175.

⁵ 3 Wils. & Shaw, 235.

⁶ *Furgharson's case*, June 25, 1741; cited in *Menzies v. Breadalbane*, *supra*; 32 R. R. 103.

any damage had actually happened to him by the erection, it was held that, nevertheless, as the encroachment was not of a slight and trivial, but of a substantial, description, it must always involve some risk of injury.¹ "Mere apprehension of danger," says Lord Chelmsford, "will not, however, be sufficient, but "any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor; and therefore, the act being *primâ facie* an encroachment, the onus seems properly to be cast upon the party doing it, to show that it is not an injurious obstruction."

Bickett v. Morris.

In *Bickett v. Morris*,² an application was made by a riparian owner on the banks of a non-navigable stream to the Court of Session in Scotland for an interdict, and an action was brought to have it declared that the opposite riparian owner had no right to erect buildings in the *alveus* of the river to his injury. It was contended by the defender that unless the erection complained of did some material damage to the pursuers, the Court could not interfere by action or interdict; on appeal the House of Lords held, affirming the decision of the Court of Session, that though each proprietor on the banks of a non-tidal river had a property in the soil of the *alveus* from his own side to the *medium filum fluminis*, neither is entitled to use the *alveus* in such a manner as to interfere with the natural flow of the water nor to abridge the width of the stream, or to interfere with its regular course, but that anything done *in alveo*, which produces no sensible effect on the stream, is allowable; and further, that even though immediate damage cannot be described, nor actual loss predicated, yet, if an obstruction be made to the current of a stream, that obstruction is one which constitutes an injury which the Courts will take notice of as an encroachment which the adjacent proprietors have a right to have removed.³ In *A.-G. v. Lonsdale*,⁴ Malins, V.-C., held that a riparian owner who was also owner of the soil of a public navigable river, had no greater rights to use the *alveus* of a tidal river than of a non-tidal river, and that, therefore, he was not authorized to erect a jetty reaching across one-third of the width of the river; for, although the damage proved by the plaintiff, an opposite riparian owner, was not sufficient to call for the interference of the Court,

A.-G. v. Lonsdale.

¹ *Bickett v. Morris*, L. R., 1 H. L. Sc. 47.

² L. R., 1 H. L. Sc. 47.

³ See *Eddleston v. Crossley*, 18 L. T. 15; *Palmer v. Perase*, 1r. R., 11 Eq. 616;

Belfast Rope Works v. Boyd, 21 L. R., 1r. 560.

⁴ L. R., 7 Eq. 377.

yet the erection of the jetty, which was a solid pier extending fifty-three yards across the river, was such an injury to the plaintiff's rights as would justify the Court to interfere without proof of such damage; and that further the defendant, as owner of the bed of the river, had no right to erect the works in question, as they might interfere with the navigation of the river, if not at present, yet at some future time.¹

In the case of *Orr Ewing v. Colquhoun*,² the appellants, the owners of the bed of a non-tidal river over which the public had by prescription a right of free navigation, erected a bridge on piers resting on the bed of the river. The House of Lords on appeal reversed an order of the Inner House, which had affirmed an interlocutor of the Lord Ordinary, and held that the piers of the bridge complained of were no actual obstruction to the navigation of the river as prescriptively enjoyed by the public; and that, therefore, the interlocutor ordaining that the piers should be removed should be reversed. Lord Blackburn, in commenting on the case of *Bickett v. Morris*,³ and the Scotch cases therein affirmed,⁴ thus explains the law: "I think and
"submit to your Lordships that the principle on which they
"were really decided was, that where any unauthorized erection
"is a sensible injury to the proprietary rights of an individual,
"there is *injuria* for which he might, in a Court of law in
"England, recover at least nominal damages. A Court of
"Equity in England, or the Court of Session in Scotland,
"in the exercise of its equitable jurisdiction, would not order
"the removal of the erection, if convinced that the damage
"was only nominal;⁵ but where there is an injury to the
"proprietary rights in running streams, the present injury
"now producing no damage may hereafter produce much.
"And I understand the principle of *Bickett v. Morris*⁶ to be,
"that where an erection is a present sensible *injuria* to the
"proprietary right of the owner of the other part of the *alveus*,
"or of the opposite bank of a running stream, he may have it
"removed on the ground that there is a present injury to the
"right of the property, if it is impossible to predicate that it

*Orr Ewing v.
Colquhoun.*

¹ See also *Jessel, M. R.*, in *A.-G. v. Terry*, L. R., 9 Ch. 425; 30 L. T. 215.

² 2 App. Cas. 839.

³ L. R., 1 H. L. Sc. 47.

⁴ *Menzies v. Breadalbane*, 3 Wils. & Sh. 238; 32 R. R. 103; *Aberdeen v. Menzies*, Morr. Dict. 12, 787; *Blantyre v. Down*, 10

Dunlop, 542; *Hamilton v. Eddington*, Morr. Dict. 12, 826; *Burnis v. Brown*, Hume's Dict. 504; *Gillatly*, 1 Macphers. 592; *Farquharson*, Morr. Dict. 12, 787.

⁵ See *Eddleston v. Crossley*, 18 L. T. 15.

⁶ L. R., 1 H. L. Sc. 47.

“may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage. And I think the same principle will apply where the complaining party is not a proprietor *ex adverso* of the spot where the erection is made,¹ but is a proprietor of land on the banks of the stream below the spot, but so near to it that the erection *in alveo* alters the natural flow of the water on the complaining parties’ land; but I do not think it was intended to be decided, and I do not think it is the law, that an erection *in alveo* of a natural stream is illegal *per se*, if all who have property on the banks of the stream consent to the erection; nor do I think it was meant to be decided, nor do I think it law, that a riparian proprietor on the water of Kilmarnock, or on the water of Irvine, into which it flows, ten miles below the town, on whose land the flow of water would be in no way affected, could have maintained the action against Bickett for altering the line of his building in the town on the water side, which Morris, the proprietor of the houses and building ground immediately opposite, did maintain; for I think there would be no injury to the proprietary right of the party complaining in respect of such land, no *injuria* to him.” At page 861 the learned Lord continues, “In the case of *A.-G. v. Lonsdale* the obstruction was in a tidal river, but it occupied one-third of the bed of the river. In *A.-G. v. Terry* there was an actual occupation by the piles put in by the defendant of part of what was used for the navigation and wanted for navigation; the Master of the Rolls submitted an opinion that the Court of Equity might order the piles to be removed, though doing no present damage to the navigation, if there might be a damage hereafter—I apprehend, on the ground of the piles being placed on the soil of the Crown, and, therefore, a wrong to the Crown. How that may be in such a case, it is unnecessary to consider. I think it clear law in England, that except at the instance of a person (including the Crown), whose property is injured, or of the Crown in respect of an injury to a public right, there is no power to prevent a man making an erection on his own land, though covered with water, merely on speculation that some change might occur that would render that piece of land, though not now part of the waterway, at some future period available as part of it. I

¹ See *Palmer v. Perse*, Ir. R., 11 Eq. 616.

"think that the land being covered with water is, in such a case, a mere accident; and that the defenders are as much at liberty to build on the bed of the river (if thereby they occasion no obstruction) as they would be to build on an island, which might at some future period be swept away."¹

From these cases it would seem, that the owner of the bed of a public navigable river may exercise all the rights of property in the soil of its bed, though covered with water, provided that he does not in any way interfere with the rights of the public or of the riparian owners. It must, however, be kept in mind, that as in a public river the right of navigation extends to the whole of the navigable channel, any erection in it which might become from time to time an actual obstruction would become a nuisance and illegal.²

The right of navigation is a simple right of way, similar to the right which the public have to passage along a public road, and involves no right of property in the bed or banks.³ The banks of a tidal river above high water mark remain private property, and are not "*publici juris*," so as to give the public navigating the river a right, in the absence of prescription, to land themselves or their goods, or to moor their vessels thereon.⁴ It is now, however, undoubted law that the right of passing over the foreshore of a tidal river at low water mark, being a necessary incident to the right of navigation, is involved in it;⁵ and that where a person having a right to land on the banks has come to shore, he may disembark in a usual or reasonable way, as by wading or by means of a plank placed on the bed of the river.⁶

Ownership of river banks and right of landing and towing thereon.

The banks of navigable rivers not being *publici juris*, but remaining private property, the public are not entitled at common law to tow on the banks.⁷ The right of passage over

Right of towing.

¹ In *Bouth v. Ratté*, 15 App. Cas. 188; 62 L. T. 198; 59 L. J., P. C. 41, it was held, that the respondent as a riparian owner was entitled to construct and moor to his bank a floating wharf and boathouse, the same not being an obstruction to navigation, and to maintain an action for damages in respect thereof, caused by any unauthorized interference with the flow and purity of the stream.

² See *post*, Chap. VII.; see also *Jessel, M. R., A.-G. v. Terry*, L. R., 9 Ch. 425.

³ See *Orr Ewing v. Colquhoun*, 2 App. C. 839.

⁴ *Ball v. Herbert*, 3 T. R. 262; 1 R. R. 695; *Blundell v. Cuttrel*, 5 B. & A. 268; 24 R. R. 353, per Bayley, J. See *Hale de Portibus Mar.* p. 84; *Bracton*, lib.

1, c. 12, s. 6; *Callis on Sewers*, p. 73.

⁵ *A.-G. v. Wemyss*, 3 App. Cas. 192, *ante*, p. 40.

⁶ *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 172; 41 L. J., Q. B. 41; 25 L. T. 793; *Blundell v. Cuttrel*, 5 B. & A. 268; 24 R. R. 353; per Best, J. See also *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

⁷ *Bull v. Herbert*, 3 T. R. 253; 1 R. R. 695; *Peirce v. Lord Fauconberg*, 1 Bulst. 292; *Vernon v. Prior*, cited in *Ball v. Herbert*, *supra*; 1 R. R. 695; *Prior of Tynemouth's case*, Harg. Tr. 79; see *Zungers v. Whiskeard*, 38 Eliz. C. B. MSS., cited in *Bull v. Herbert*; 1 R. R. 695, p. 261.

the banks of a navigable river for the purpose of towing vessels is an easement or right of way only, similar in all respects to ordinary rights of way. A towing-path may be a highway to be used only for towing barges or vessels.¹ The right of towing, therefore, depends on usage or custom.

"That there is such a custom," says Lord Kenyon, C. J., "on most navigable rivers no persons doubt, but still the right is founded solely on the custom." . . . "If navigation has been carried on for a series of years, and this right of towage constantly exercised, there would be abundant usage on which it might be supported."² . . . "Perhaps small evidence of usage before a jury would establish a right by custom, on the ground of public convenience."³ Thus, with regard to the river Thames, it appears that previous to the early statutes for the improvement of the river there were originally towing-paths along the river banks, the owners of which took tolls from the public for the use of them.⁴

Conservancy
of navigable
rivers.

The regulation and protection of the rights of navigation in all the principal rivers of the kingdom is now vested in Boards of Conservators, who are made the guardians, as it were, of the navigation, and the protectors of the bed and soil for the purposes of navigation.⁵

It may be here noted that in the river Thames, which by its size and position is the most important of our rivers, the ownership of the soil of the bed up to high water mark, which had long been a subject of contention between the Crown and the Corporation of the City of London, is by the Thames Conservancy

¹ See *Winch v. Conservators of Thames*, 1 L. R., 7 C. P. 471; 43 L. J., C. P. 167; 31 L. T. 128; *Rea v. Severn and Wye*, 2 B. & A. 648. Where a canal company acquired land under an Act of Parliament, and used it for the purposes of a towing-path, and it appeared that the use of it as a public footpath was not inconsistent with its use as a towing-path by the company, it was held that the company could dedicate the land as a public footpath, subject to its use by them as a towing-path: *Grand Junction Canal v. Petty*, 21 Q. B. D. 273; 57 L. J., Q. B. 572; 59 L. T. 767 (C. A.). See also *Il. v. Leake*, 5 B. & Ad. 469; 39 R. R. 521; *Mulliner v. Mid. Rail. Co.*, 11 Ch. D. 611.

If an Act for inclosing and allotting the common and waste lands of a parish through which a navigable river flows, empowers commissioners to set out such

public and private roads and ways as they shall think necessary, and directs that all roads and ways not so set out shall be deemed parts of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction: *Simpson v. Scales*, 2 Bos. & P. 496; 5 R. R. 685.

² *Ball v. Herbert*, 3 T. R. p. 261; 1 R. R. 695.

³ See also per Bovill, C. J., in *Winch v. Conservators of Thames*, L. R., 7 C. P. 471.

⁴ *Winch v. Conservators of Thames*, L. R., 9 C. P. 378; L. R., 7 C. P. 471; 43 L. J., C. P. 167; 31 L. T. 128. See *Bath River v. Willis*, 2 Rail. C. 7; 19 Hen. IV. c. 18.

⁵ *Cory v. Britton*, 2 App. C. 262. As to conservancy, see further Chap. VII., *post*.

Acts vested in the Corporation of the City of London, who in their turn convey all their interest and title to the conservators under the Acts.¹

Where, however, a river or navigation has been vested by Act of Parliament in a Board of Conservators for the purposes of navigation, if the words of the Act are applicable to the acquisition by the conservators of the right or easement of passage only, and where the acquisition of the soil of the river and its banks is not necessary for the purposes of the Act, the ownership of the soil must be taken not to pass, the Courts not being inclined to infer that a statute of this kind gives more than such a use of the soil as is necessary for the purposes of navigation.²

Ownership of bed and banks not generally vested in conservators.

In *The Lee Conservancy Board v. Button*,³ the plaintiffs, conservators of the river Lee, brought an action to restrain the defendant, who was the owner of property adjoining a towing-path, from using the towing-path for the passage of horses and carts, and the carriage of goods and merchandize, or in any manner inconsistent with the free and convenient navigation of the river. The River Lee Navigation was originally formed in 1570, under an Act of Parliament in the 13th year of Queen Elizabeth; and it was provided therein that the trustees and their successors should have the ground therein set out along the whole length of the navigation for such composition as they should make with the owners and occupiers of the soil and ground. Several other Acts were passed previous to the 7th Geo. III. c. 51. By that Act trustees were empowered to extend, improve and maintain the navigation, and, amongst other things, to set out and make towing-paths, making compensation for any messuages, &c. which the trustees should adjudge necessary, convenient or proper to become seised or possessed of for the purposes of the Act. The navigation and use of the towing-paths was to be free to the public on payment of tolls; and any person who wilfully damaged or destroyed any banks or other works erected or

Lee Conservancy Board v. Button.

¹ 20 & 21 Vict. c. 147; 57 & 58 Vict. c. 187, s. 68. See *Cory v. Bristow*, 2 App. C. 262; *Watkins v. Milton*, L. R., 3 Q. B. 350; *Forrest v. Greenwich*, 8 E. & B. 390. As to the Thames at Oxford, see *Grant v. Oxford*, L. R., 4 Q. B. 9. See also *Rex v. Mayor of London*, 4 T. R. 21.

² *Badger v. Yorkshire Rail. Co.*, 5 Jur., N. S. 459; *Hollis v. Goldfinch*, 1 B. & C. 205; 25 R. R. 357. See also *R.*

v. Aire and Calder Navigation, 9 B. & C. 820; 33 R. R. 344; *R. v. Mersey and Irwell Navigation*, 9 B. & C. 95; 32 R. R. 591; *R. v. Thomas*, 9 B. & C. 114; 32 R. R. 601; *Chelsea Water Co. v. Bowley*, 17 Q. B. 358; *Bruce v. Willis*, 11 A. & E. 463.

³ 12 Ch. Div. 383; 41 L. T. 481, affirmed 6 App. C. 685; 51 L. J. Ch. 17; 45 L. T. 385.

made for the purposes of the navigation was liable to certain penalties. In 1767, the trustees made a new cut, altering the course of the river, and adapted the towing-path to the alteration. Under powers of the Act, 31 & 32 Vict. c. 154, the trustees made bye-laws, providing that no person should allow any horse or cattle to trespass on the towing-paths. The defendant bought his property in 1871, and the towing-paths had never been used by his predecessor for horses, carts or carriages; but defendant used the towing-path of the new cut for carting bricks, the effect of which was to cut up and destroy the towing-path, and materially to interfere with the navigation. The defendant alleged that he and his predecessors had always had the soil of the towing-path vested in them and he did not admit that the plaintiffs had any easement over it; but even if they had such an easement, they were not entitled to the exclusive use thereof, and had no authority to prevent the towing-path from being used for all lawful purposes—such as carting lawful goods and merchandize. Malins, V.-C., held that the plaintiffs were entitled by their Acts of Parliament to the freehold of the towing-path, and granted an injunction to restrain the defendant as prayed. On appeal, the Lords Justices varied this decree, holding that by the various Acts of Parliament the plaintiffs did not acquire the freehold of the land forming the towing-path, which remained in the original owners, nor any easement over it, but only the right and the duty to keep it in a fit state for the public to use as a towing-path; but that, by reason of this right and duty, the plaintiffs were entitled to an injunction to restrain the defendant from so using the towing-path as to interfere with its use by the public for the purposes of navigation.

Brett, L. J., says: "The Act of Parliament gives them (the plaintiffs) no easement, the Act of Parliament gives them no possession, but it gives them a mere legal right of entry without possession, and it imposes upon them the duty, as long as they take tolls, to keep the towing-paths in such a state that the navigation of the canal, and the use of the towing-path by the public, may not be impeded. Apply that to the case of the towing-path opposite to the defendant's land, and it leaves him the owner of that land. It is not properly a towing-path opposite his land, but it is a towing-path on his land, and the plaintiffs' only right being to use that towing-path and to keep

“it in a fit state for the public to use it. He has every right over that land which is his own, other than a right to impede the navigation. The only prohibition against him by virtue of the Act is, that the plaintiffs have a right—a duty to see that there is a free towing-path over his land.”

In the case of *Hollis v. Goldfinch*,¹ which was an action of trespass by the conservators of the river Itchen against the defendant, the owner of land adjoining, for cutting trees on the bank of a channel made under their Act (16 & 17 Car. II.), the Court held that the defendant was not liable to an action: for that, first, by the provisions of the Act, the proprietors of the navigation did not necessarily acquire such an interest in the soil in a bank adjoining to and formed of earth excavated out of the new channel, as to enable them to maintain trespass; and, secondly, that as the purchase of the soil was not necessary for any of the purposes of the Act, it was to be inferred that no such purchase had been made; and, thirdly, that acts of ownership by the proprietors of the navigation upon different parts of the bank contiguous to the new channels, were not admissible in evidence to show that the soil of the bank in question belonged to the proprietors of the navigation.

*Hollis v.
Goldfinch.*

In the case of *Bruce v. Willis*,² a canal company were enabled by Act of Parliament to purchase lands, paying full satisfaction; and commissioners were appointed to settle the amount of satisfaction payable in each case, and in certain cases to summon juries to assess damages. Judgments of the commissioners and verdicts of the juries were to be transmitted to the clerk of the peace, and to be deemed records of Sessions. By an inquisition, a jury assessed damages at thirty years' purchase for certain lands necessary for making a cut, &c., part of the navigation, and an annual payment was awarded for certain land required for a towing-path. The canal company made a lock, canal, and towing-path on the land aforementioned, but no conveyance was ever executed. The Court held that the Act of Parliament vested the soil used for these works in the canal company without a conveyance.

*Bruce v.
Willis.*

There is no common law liability on the owner of the bed

No duty at
common law
to cleanse
rivers.

¹ 1 B. & C. 205; 25 R. R. 357; 1 L. J. (O. S.), K. B. 94.

² 11 A. & E. 463; 9 L. J., M. C. 43; *R. v. Mersey and Irwell Navigation*, 9 B. & C. 95; 32 R. R. 591; *R. v. Thomas*, 9 B. & C. 114; 32 R. R. 601. See *Somerset Canal v. Harecourt*, 2 De G. & J. 596;

Reg. v. Archbishop of York, 14 Q. B. 81; *Patrick v. Beaufort*, 6 Ex. 498; *Robins v. Warwick*, 2 Bing. N. C. 483; 42 R. R. 642; *Harborough v. Shadlow*, 7 M. & W. 37; *Dimes v. Grand Junction Canal*, 3 H. L. 794; *Simpson v. Staffordshire Water Co.*, 4 De G., J. & S. 679.

of a navigable river or navigation to cleanse it or keep it free of obstructions, or to compensate adjoining owners for damage done by overflow of the water, even in cases where tolls are taken for navigating thereon.¹ It would seem, moreover, that at common law neither the owners of the bed of a navigable river or navigation, nor a board of conservators, are bound to keep the navigation open or in a proper state of repair; but that so long as they choose to keep the navigation open and to take tolls for its use, even where those tolls are not for their own profit, but for the maintenance of the navigation, they are under an obligation to take reasonable care that persons using it are exposed to no undue danger;² where no tolls are taken, it has been held that there is no liability to repair or remove obstructions.³

Rights of
riparian
owners.

Riparian owners on the banks of tidal navigable rivers have similar rights and natural easements to those which belong to a riparian proprietor above the flow of the tide, underlying and controlled, but not extinguished by, the public right of navigation.⁴ These rights do not depend on the ownership of the soil of the stream, but, so far as they relate to a natural stream, exist *jure nature*, because the land has by nature the advantage of being washed by the stream. It is, of course, necessary for the existence of a riparian right, that the land should be in contact with the flow of the stream; but lateral contact is as good *jure nature* as vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is amply sufficient foundation for a natural riparian right.⁴

The various rights of riparian owners will be treated of fully in another chapter,⁵ and it may suffice to say that the owner of the bed of a natural stream has the right to have the water of the stream come to him in its natural state in flow, quantity and quality, and go from him without obstruction, as a right incident to his property, which in no way depends on prescription or the

¹ *Hodgson v. Mayor of York*, 28 L. T., N. S. 836; *Cracknell v. Thetford*, L. R., 4 C. P. 629; 38 L. J., C. P. 353; *Parrett Navigation v. Robins*, 10 M. & W. 593; 12 L. J., Ex. 81; *Bridge's case*, 10 Rep. 33.

² *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *Parnaby v. Lancaster Canal*, 11 A. & E. 223; *Winch v. Conservators of Thames*, L. R., 9 C. P. 378; L. R.,

7 C. P. 456; *Manby v. St. Helens*, 2 H. & N. 840; 27 L. J., Ex. 159.

³ *Forbes v. Lee Conservancy*, 4 Ex. Div. 116; 48 L. J., Ex. 402.

⁴ *Lyon v. Fishmongers' Co.*, 1 App. C. 662; *North Shore Rail. Co. v. Pion*, 14 App. Cas. 612; *A.-G. v. Wemyss*, 3 App. Cas. 192, P. C.; *Hamelin v. Bannerman*, (1895) App. Cas. 237.

⁵ See *post*, Chap. III.

presumed grant of his neighbours.¹ He is entitled to have the water flow to him in its natural state, so far as that is a benefit to him, and is bound to submit to receive it, so far as it is a nuisance to him.² He is entitled, by having a right of access to it, to the reasonable use of the water for his domestic purposes, and for his cattle; and also he may dam it up for a mill or divert it for irrigation, provided he does not interfere with the rights of other riparian proprietors, either above or below him.³

The most important right, however, belonging to an owner on the banks of a navigable river is the right of access from his land to the river, for the purposes of exercising the public right of navigation; and it may be well here to consider this right more fully.

Right of access.

A public navigable river is a public highway; and where there is a public highway, the owners of land bounded by it have a right to go on the highway from any spot on their own land.⁴ "Unquestionably," says Lord Cairns, "the owner of a wharf on the bank of a public navigable river has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quâ* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But where the right of navigation is connected with an exclusive right of access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, and it becomes a form of enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages or restrained by an injunction."⁵

In the above case of *Lyon v. Fishmongers' Co.*, a suit was brought by the appellant, the owner of a wharf on the Thames. The river bounded this wharf on the south, and a creek of the river on the west. The defendants owned a wharf at the bottom of this creek. The plaintiffs had from time immemorial a right of access to their wharf from both the main river and the creek. In 1857, the Thames Conservancy Act enabled the Conservators

¹ *Chasemore v. Richards*, 7 H. L. 382, cited by Cairns, L. C., in *Lyon v. Fishmongers' Co.*, *supra*; *Booth v. Ratté*, 15 App. Cas. 188; 62 L. T. 198; 59 L. J., P. C. 91.

² Per Blackburn, J., in *Mason v. Shrewsbury Rly.*, L. R., 6 Q. B. 582; 40 L. J., Q. B. 293; 25 L. T. 239.

³ *Miner v. Gilmour*, 12 Moo. P. C. 131; 3 L. T. 98.

⁴ Blackburn, J., in *Marshall v. Utleswater*, L. R., 7 Q. B. 116; see *ante*, p. 41.

⁵ Per Lord Cairns, L. C., in *Lyon v. Fishmongers' Co.*, 1 App. C. 662; 45 L. J., Ch. 68; 35 L. T. 569.

of the Thames to grant to owners and occupiers of land fronting the Thames a right to make quays, embankments, &c., in front of their land on payment of fair consideration. The respondents obtained in 1872 a licence to make an embankment in front of their wharf, which had the effect of entirely displacing the water from the above-mentioned creek, and so put an end to the use which had always been made by the occupants of appellants' premises. The appellant filed a bill to restrain the respondents from constructing these works, or obstructing appellant's right of access. Malins, V.-C., granted the injunction prayed for, but the Lords Justices reversed this decree; on appeal, the House of Lords reversed the judgment of the Lords Justices, and confirmed the decree of Malins, V.-C., holding that though the licence of the conservators might be a justification so far as the public right of navigation was concerned, it would not authorize a licensee, being a riparian owner, to embank in front of his land, so as to injuriously affect the land of another riparian owner by interfering with his right of access to and from it. "The taking away of river frontage of a wharf, or the raising of an impediment along the frontage, interrupting the access between the wharf and the river, may," says Lord Cairns, L. C., "be an injury to the public right of navigation, but it is not the less an injury to the owner of the wharf, which, in the absence of any parliamentary authority, would be compensated by damages, or altogether prevented."¹

Interference with, actionable without proof of special damage.

The right of access to a navigable river is, therefore, a right of property distinct from the public right of navigation, an injury to which is actionable without proof of special damage. Thus, in *Rose v. Groves*,² where the plaintiff, a riparian owner, had a public-house on the Thames, and complained that the access to and from the river was obstructed by the defendant wrongfully and maliciously placing and keeping timber in the river, so as to drift opposite the plaintiff's house; the Court held, that, as this was an injury to a private right, no proof of special damage, such as loss of custom, was necessary to support the action; and that it was not a question for the jury, whether the plaintiff had sustained special damage, for the injury complained of was not a

¹ 1 App. C. 662; 45 L. J., Ch. 68: 35 L. T. 569. See also *Eastern Counties Rly. v. Darling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202.

² 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q. B. 991; 16 L. J., Q. B. 233.

See also *Wilkes v. Hungerford*, 2 New Cases, 281; 2 Scott, 440; *Iremson v. Moore*, cited in *Chichester v. Lethbridge*, Willes, 74; *Herbert v. Groves*, 1 Esp. N. P. C. 148; *Finéuz v. Horroden*, Cro. Eliz. 664

public one to the navigation, but a private one to the right of access.

A count by owner of a messuage abutting on a navigable river, stating that defendant fixed barges, planks, &c. near the messuage, and hindered the plaintiff in the free use of the river, is good, as sufficiently showing a particular injury; for even if the jury negative actual damage, plaintiff must have judgment. But a count stating plaintiff to be reversioner is bad, while it does not show a permanent injury to the reversion.¹

In a late case in the Privy Council, on appeal from the Courts in Canada, it was urged that, on the authority of *Lyon v. Fishmongers' Co.*, every riparian proprietor as such has, beyond his right as one of the public, a right to use a navigable river in a free and uninterrupted manner, so that any obstruction placed in it would be an invasion of a private right for which an action would lie without proof of special damage. Their Lordships, however, were of opinion that this decision could not be pressed to such an extent; but that it would be a question of fact to be determined by the circumstances of each case, whether an obstruction amounts to an interference with the right of access to the river frontage.²

Thus in *Booth v. Ratté*,³ which was an appeal from the Courts of Canada, it was held by the Privy Council that the owner of a floating boathouse and wharf on the navigable river Ottawa, who was also a riparian owner, had a right to maintain an action for damages for any unauthorized interference with the flow and purity of the stream caused by the refuse from sawmills which collected in front of his wharf and boathouse so as to create an obstruction and nuisance.

In *North Shore Rly. v. Pion*,⁴ which was an appeal from the Courts of Lower Canada, it was held by the Privy Council that, where a railway company had made a railway upon the fore-shore of a tidal navigable river, cutting off the respondent's access to the water except through openings left in their embankment, by the French law prevailing in Lower Canada the respondents, as riparian owners, had the same rights of access and *sortie* as they would have had if the river had not been navigable, and that the above obstruction to such rights

¹ *Dobson v. Blackmore*, 9 Q. B. 991; 16 L. J., Q. B. 233.

² See further as to law of Canada, *Mayor of Montreal v. Drummond*, 1 App. C. 384; 35 L. T., N. S. 106; *Brown v. Gregg*, 2 Moo. P. C. 341; 10

L. T., N. S. 45.

³ 15 App. Cas. 183; 62 L. T. 198; 59 L. J., P. C. 91; 38 W. R. 737, P. C. (1899).

⁴ 14 App. Cas. 612. See also *A.-G. v. Wemyss*, 3 App. Cas. 192, P. C.

without parliamentary authority was an actionable wrong. The Court also laid down generally that there is no distinction in principle between riparian rights on the banks of navigable or tidal and those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation, but in order to give rise to riparian rights the land must be in actual daily contact with the stream laterally or vertically. They also followed *Lyon v. Fishmongers' Co.*,¹ and held it to be applicable to every country in which the same general law of riparian rights prevails, unless excluded by some positive rule or binding authority of the *lex loci*.

Compensation
for loss of,
under 8 & 9
Vict. c. 18.

The right of access is, moreover, a portion of the valuable enjoyment of land on the banks; any works which take it away have been held to be an "injuriously affecting of the land," so as to give a right to compensation under the Lands Clauses Consolidation Act.² In the case of *Duke of Buccleuch v. Metropolitan Board of Works*,³ compensation was given for the loss of the use of a causeway over the bed of the Thames, giving access to the river at low water from appellant's garden; and in *The Metropolitan Board of Works v. McCarthy*,⁴ appellant was held entitled to compensation for loss of access from his house to a dock which was open to the public.⁵ The claim in these cases was founded on an injury to an interest in land, whereby the land was rendered less valuable; and, therefore, where an occupier of premises had been used to draw water from the river and to use a public drawdock merely as public rights, and not as rights connected with his premises, it was held that he could not recover for an interference with such rights.⁶

¹ 1 App. C. 662.

² See *Plimmer v. Wellington (Mayor of)*, 9 App. Cas. 699, 714.

³ L. R., 5 H. L. 418; 42 L. J., C. P. 385; 37 L. T. 182.

⁴ L. R., 7 H. L. 243; 23 L. J., C. P. 385; 37 L. T. 182. A wharf owner, who has not any special easement or privilege over the bed or soil of the river, but only the common right of passage to his property, has neither an easement over nor a right in "land," within the enlarged definition given to that word by sect. 4 of the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93).

A person so situated, therefore, whose land is not taken, but whose right of passage is injuriously affected by the works authorized by the 25 & 26 Vict. c. 93, has no right to compensation before those works are proceeded with;

but having regard to the provisions of that Act, and of the various Acts incorporated therewith, his right to compensation arises when his damage is completed, and his remedy is under sect. 68 of the Land Clauses Act, 1845, or by arbitration alone: *Macey v. Metropolitan Board of Works*, 33 L. J., Ch. 377; 10 L. T. 66.

⁵ L. R., 7 H. L. 243. In the above-cited case of *North Shore Ry. v. Pion*, it was further held that the Quebec Railway Consolidation Act, s. 9, gave no authority to a railway company to exercise its powers in such a manner as to inflict substantial damage upon land not taken, without compensation. See also, on this point, *Corporation of Parkdale v. West*, 12 App. Cas. 602.

⁶ *Reg. v. Metropolitan Board of*

In the case of *A.-G. v. Conservators of the Thames*,¹ the obstruction was held to be, if an obstruction at all, an obstruction to the navigation, and not to the public right of access. In a late case the Master of the Rolls has held that a riparian owner has a right to moor a vessel of ordinary size alongside his wharf for the purposes of loading and unloading at reasonable times, and for a reasonable time; and that the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, even though the vessel may overlap his premises; but that such vessel would not be allowed to interfere with the proper right of access to the neighbouring premises, if used as a wharf, nor to the free entrance to or exit from such premises, if used as a dock by other vessels.²

It would appear that, as a necessary incident to the right of access, there must be the right of landing and of passing over the shore at all states of the tide for that purpose, even when such shore is private property.³ Thus in *A.-G. v. Wemyss*⁴ it was laid down by the Judicial Committee that the owner of a tenement adjoining the foreshore of the sea has the same rights of access to the sea as a riparian owner on a tidal river, and that the right of the owner of the foreshore is subject to the obligation of allowing the owner or occupier of land adjoining the sea free access or egress to and from the sea from and to his land, and to beach, land and haul up boats upon the shore.⁵

Right to land and cross the shore as incident to the right of access.

In the case of *Marshall v. Ulleswater Co.*⁶ it was held that persons having a right to navigate on a navigable lake were entitled to pass over a pier belonging to plaintiff, the owner of the soil of the bed of the lake, which had been wrongfully erected on the soil of the lake by a third party, but was maintained by plaintiff, and which prevented persons having a right of access

Works, L. R., 4 Q. B. 358. See *Beckett v. Metropolitan Board of Works*, L. R., 3 C. P. 82; 17 L. T., N. S. 499.

¹ 1 Hem. & M. 1. See also *Kearns v. Cordwainers' Co.*, 6 C. B., N. S. 388; 28 L. J., C. P. 285.

² *Original Hartlepool Colliers v. Gibb*, 8 Ch. Div. 713.

³ "Independently of authorities, it appears to me quite clear that the "right of a man to step from his own "land on to a highway is something "quite different from the public right "of using the highway. The public "have no right to step on to the land of "a private proprietor adjoining the road. "And though it is easy to suggest meta-

"physical difficulties when an attempt "is made to define the private as distinguished from the public right, or to "explain how the one could be infringed "without at the same time interfering "with the other, this does not alter the "character of the right." Per Wood, V.-C., in *A.-G. v. Conservators of Thames*, 1 Hem. & M. 1. As to this see more fully *ante*, p. 40.

⁴ 3 App. Cas. 192. See also *North Shore Rly. v. Pion*, 14 App. Cas. 612.

⁵ See also on this last point, remarks of Lindley, L. J., in *Hindson v. Ashby*, (1896) 2 Ch. 1, at p. 9; and *A.-G. v. Wright*, (1897) 2 Q. B. 318.

⁶ L. R., 7 Q. B. 166.

from coming down to the brink of the lake for the purposes of going on it to exercise the public right of navigation.¹

It must, however, be clearly understood that this right of access and of landing is strictly a right of property in the riparian owner, and in no way extends to the public who navigate the river. The public have all such rights as with relation to the circumstances of each river are necessary for the convenient passage of vessels, such as stopping for a reasonable time to unload, grounding and anchoring, and of fixing moorings in the foreshore, but it has been held that they have no right of landing on the banks, or of drawing up or leaving fishing boats above high water mark, apart from exceptional circumstances such as stress of weather.²

Public right
of fishery.

The right of fishery³ in estuaries and arms of the sea, and in navigable tidal rivers, so far as the tide flows and reflows, is *prima facie* common to all the subjects of the realm.⁴ It seems somewhat doubtful whether this right is to be considered as belonging to the public of common right, or whether they derive it from the Crown as owner of the bed and soil of tidal waters.⁵ This public right cannot exist at law in non-tidal waters, even though navigable, the right of navigation giving no right to fish.⁶ The right of fishing includes the right to take shellfish,⁷ and may be carried on by lawful nets.⁸

Several
fishery.

Though the right of fishing in tidal waters is *prima facie* in the public, yet the right to exclude the public therefrom and to create a several and exclusive fishery existed in the Crown, and might lawfully have been exercised by the Crown before Magna Charta.⁹ The Crown cannot now exclude the public or create a several fishery,¹⁰ and therefore all claims to a several fishery in a tidal river must now be supported by proof of a grant or by

¹ See *Eastern Counties Rly. v. Durling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202.

² *Ilchester v. Rashleigh*, 5 T. L. R. 739; 61 L. T. 477; 38 W. R. 104, and cases on p. 46, *ante*.

³ See *post*, Chap. VI.

⁴ *Malcolmson v. O'Dea*, 10 H. L. 593; 9 L. T. 93; *Crichton v. Culley*, 19 W. R. 167; *Carter v. Murrett*, 4 Burr. 2163; *Fitzwalter's case*, 1 Mod. 106.

⁵ See Woolrych on Waters, p. 76; *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; *Murphy v. Ryan*, Ir. R., 2 C. L. 143. *Quære*, whether the Crown ever could have as part of its prerogative an exclusive right of fishery in a non-

tidal river flowing over the soil of a subject: *Devonshire v. Pattinson*, 20 Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392.

⁶ *Murphy v. Ryan*, *supra*; *Musset v. Burch*, 35 L. T., N. S. 486; *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; *Pearce v. Scotcher*, 9 Q. B. D. 162; *Smith v. Andrews*, (1891) 2 Ch. 678; *Hindson v. Ashby*, (1896) 2 Ch. 1.

⁷ *Bagot v. Orr*, 2 Bos. & Pull. 472; 5 R. R. 668.

⁸ *Warren v. Mathews*, 6 Mod. 73.

⁹ *Malcolmson v. O'Dea*, 10 H. L. 593; 9 L. T. 93.

¹⁰ *Warren v. Mathews*, *supra*.

immemorial custom or prescription, such as will raise the presumption of such a grant, and from which such a grant will be inferred, in the absence of any evidence to show that its origin was modern.¹

A several fishery in a public navigable river is subject to the public right of navigation, and a grantee takes subject to this right, and cannot make any claim or demand, even if expressly granted to him, which in any way interferes with this right.²

The right of the Crown to exclude the public from their common right of fishing, and to create a several exclusive fishery in a subject was formerly a part of the royal prerogative; and although this right is said in the cases above cited to arise from the ownership of the Crown of the bed of the river, yet such a fishery may exist in a subject, apart from the ownership of the soil of the bed, as an incorporeal hereditament.³ As the two rights are thus divisible, it would appear that the grant of a portion of the soil of the bed of a tidal river will not necessarily pass a several fishery in the part granted, though it may do so, if the words of the grant admit of such a construction;⁴ and further that the grant of a several fishery in a tidal river will not necessarily pass a right to the soil, though it is *primâ facie* evidence that the soil was intended to be passed.⁵

Private Rivers and Streams.

All rivers and streams above the flow and reflow of the tide are *primâ facie* private, though many have become by immemorial user or by Act of Parliament subject to the public rights of navigation. Where a river has by immemorial user or by an Act of Parliament, which does not expressly affect the rights of the soil, become subject to the public right of navigation, none of the incidents attaching to a navigable river up to the flow and reflow of the tide can properly attach.⁶ The right of navigation gives no right of property,⁷ nor of fishing.⁸

¹ *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 732.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; 35 L. J., C. P. 29; 12 L. T. 150.

³ *Duke of Somerset v. Fogwell*, 5 B. & C. 884; 29 R. R. 449.

⁴ *Scrutton v. Brown*, 4 B. & C. 485; 28 R. R. 344; *R. v. Ellis*, 1 M. & S. 652; *Gray v. Bond*, 5 Moo. 527; 23 R. R. 530.

⁵ *A.-G. v. Emerson*, (1891) App. Cas. 649; *Hindson v. Ashby*, (1896) 2 Ch. 1, per Lindley, L. J., at p. 9; *Duke of*

Somerset v. Fogwell, *supra*; 29 R. R. 449. As to Fishery, see *post*, Chap. VI.

⁶ *Murphy v. Ryan*, 1r. R., 2 C. L. 148; *Musset v. Burch*, 35 L. T., N. S. 486; *Hargreaves v. Diddams*, L. R., 10 Q. B. 582; 44 L. J., M. C. 178; 32 L. T. 600.

⁷ *Orr Ewing v. Colquhoun*, 2 App. C. 839.

⁸ *Hargreaves v. Diddams*, L. R., 10 Q. B. 582; *Hindson v. Ashby*, (1896) 2 Ch. 1.

Ownership of
soil of bed.

When the lands of two conterminous proprietors are separated from each other by a running non-tidal stream of water, each proprietor is *primâ facie* owner of the soil of the *alveus*, or bed of the river, *ad medium filum aque*. The soil of the *alveus* is not the common property of the two proprietors, but the share of each belongs to him in severalty, so that if from any cause the course of the stream should be permanently diverted the proprietors on either side of the old channel would have a right to use the soil of the *alveus*, each of them up to what was the *medium filum aque*, in the same way as they were entitled to the adjoining land.¹ Where the same person is the proprietor of the ground on both sides of the stream, he is *primâ facie* the proprietor of the whole of the channel.² This presumption is liable to be rebutted, but if not rebutted it is the legal presumption.³

The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river, *usque ad medium filum*, should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question, which negative the possibility of such having been the intention.⁴

The more than ordinary breadth of a river does not prevent a conveyance of premises therein described as bounded by the river from operating to convey the portion of the bed and soil of the river abutting thereon up to mid-stream; and therefore a conveyance of one hundred and twenty acres of land on the banks of a river was held to convey also ten acres of the bed of the river, although the estimate of one hundred and twenty acres was satisfied by the contents of the land, exclusive of the bed of the river.⁵ A grant by the Crown of land bounded by a non-navigable creek has been held to pass the soil of the creek *ad medium filum aque*, as the description of the boundaries in the grant did not exclude from it that portion of the creek which by the general presumption of the law would go along with the ownership of the land on the banks of it.⁶

¹ *Bickett v. Morris*, L. R., 1 Sc. App. 47; *Wishart v. Wyllie*, 1 McQ., H. L. 389; *Carter v. Murcott*, 4 Burr. 2162; *Reg. v. Inhabitants of Landulph*, 1 McQ. & R. 393; 42 R. R. 812; *R. v. Wharton*, 12 Mod. 510; *Eddleston v. Crossley*, 18 L. T. 15.

² See *Orr Ewing v. Colquhoun*, 2 App. C. 856.

³ See *Deronsire v. Pattinson*, 20

Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392, *post*, Chap. VI.

⁴ *Deronsire (Duke of) v. Pattinson*, 20 Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392; 52 J. P. 276 (C. A.). See also *Eckroyd v. Gaultard*, (1898) 2 Ch. 358; 67 L. J., Ch. 458; 78 L. T. 702 (C. A.).

⁵ *Dwyer v. Rich*, Ir. R., 4 C. L. 424.

⁶ *Lord v. Commissioners of Sydney*,

Though the presumption that a grant of land described as bounded by an inland river passes the adjoining half of the bed of the river may be rebutted by circumstances which show that the parties must have intended it not to pass, it will not be rebutted because subsequent circumstances, not contemplated at the time of the grant, show it to have been very disadvantageous to the grantor to have parted with the half bed, and if contemplated would probably have induced him to reserve it; nor is the presumption excluded by the fact that the grantor was owner of both banks of the river.¹

Whether a river running along waste of a manor is waste is a question of fact. An Act for enclosing moors, commons, and waste grounds of a manor does not apply to the bed of a river which is proved not to be waste of the manor but freehold of the land and not subject to any commonable rights. Therefore an award under the Act of waste bordering on the river does not carry with it the bed of the river *ad medium filum*.²

In the case of *Tilbury v. Silva*³ it was held by Kay, J., affirmed by the Court of Appeal, that the presumption that under a grant of land on the bank of a river the soil *ad medium filum aque* passes to the grantor holds good in copyhold as well as freehold grants.

When a stream changes its course by slow and imperceptible steps, the riparian owners are obliged to accept the consequent alteration in their boundaries; but when the shifting is sudden and well marked, the original *medium filum* continues to be the border line, and the stream so far passes entirely within the land of the one proprietor.⁴ Land, therefore, gained gradually and imperceptibly from a stream belongs by accretion to the owner of the adjoining soil, who must also bear gradual and imperceptible loss from the same cause.⁵ Where by long continued natural accretion of gravel the bed of a river and consequently the flow of water have become permanently altered, it is not within the rights of a riparian owner, by removing the accretion, to restore the flow of the water to its former state as to velocity and direction.⁶

When a river changes its course.

12 Moo., P. C. 473; 3 L. T. 1. See also *Crossley v. Lightowler*, L. R., 3 Eq. 279.

¹ *Micklethwait v. Newlay Bridge Company*, 33 Ch. D. 133. See also *Berridge v. Ward*, 10 C. B., N. S. 400; *Leigh v. Jack*, 5 Ex. D. 264.

² *Eckroyd v. Coultard*, (1898) 2 Ch. 258; 67 L. J., Ch. 458; 78 L. T. 702 (C. A.).

³ 45 Ch. D. 98; 62 L. T. 254.

⁴ Phear, Rights of Water, 12; *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; *Ford v. Lucy*, 7 H. & N. 151.

⁵ See ante, pp. 69 et seq.

⁶ *Whithers v. Purchase*, 60 L. T. 819. See also *Hindson v. Ashby*, (1896) 2 Ch. 1, and cases ante, on pp. 69 et seq.

Where, however, a river suddenly changes its course, the property remains as before, according to the former bounds.¹

Where a river had formerly flowed wholly within the lands of one proprietor, and by gradual and imperceptible degrees wore away its banks, and approached and eventually encroached upon the land of the defendant, a proprietor adjoining, it was held that as the former proprietor originally owned the whole of the bed, he had not lost his property in it by the gradual change of the course of the river, and could maintain an action of trespass against the defendant for fishing on a strip of the bed which before the encroachment had been his (defendant's) property.²

Where a river is bisected into two courses by an island in its middle, the *medium filum* for boundary purposes is that which bisects the island; but if the island be nearer to one side than the other, it appears that, in America at least, where such cases have been much considered, no account is taken of the smaller branch—the other alone represents the river, and its *medium filum* constitutes the *primâ facie* line of division.³ If an island is formed by natural causes, the property in it remains apportioned in the same manner as was before its appearance the property in the soil on which it stands.⁴

If a shifting island springs up in the channel so as to impede or embarrass the fishing of one of the proprietors, he must submit, and hope for a change. The law can give him no redress. But if the shifting island becomes fixedly annexed to, and incorporated with, his bank, the permanent accretion will give rise to a new *medium filum*.⁵

Though the owner of land on the banks of a non-tidal river is *primâ facie* the owner of half the bed, yet this is but a presumption, and may be rebutted; ⁶ and it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishing therein, be specially conveyed and appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto.⁷

Though the soil of the *alveus* of non-tidal rivers is the property *primâ facie* of the respective owners on the opposite sides of the river, neither of them is entitled to use it in such a manner as

Rights of
owners of
bed.

¹ *Ford v. Lucy*, 7 H. & N. 151.

² *Foster v. Wright*, 4 C. P. D. 438; 49 L. J., C. P. 97.

³ *Phear*, p. 11; *Angell, Tide Waters*, 42.

⁴ *Ibid.*; *Angell, Tide Waters*, 43.

⁵ *Zetland (Earl) v. Glover Incorpora-*

tion, L. R., 2 H. L. (Sc.) 701.

⁶ *Bloomfield v. Johnson*, L. R., 8 C. L. 104.

⁷ *Marshall v. Ulleswater Co.*, 3 B. & S. 732; see *Bristow v. Cormican*, 3 App. C. 668.

to interfere with the natural flow of the stream, to the injury of the other riparian owners, or of any right of navigation which has been acquired by the public.¹ Subject to this restriction they are entitled to protect their property from the invasion of the water, by building a bulwark, *ripæ muniendæ causâ*; but even in this necessary defence of themselves they are not at liberty to conduct their operations so as to do any actual injury to the property on the opposite side of the river.²

Though rivers above the flux and reflux of the tide are *prima facie* private rivers, yet the public may acquire a right or easement to navigate such waters by express grant, or dedication by immemorial user, which presumes a grant, or by Act of Parliament. Where such right has been acquired, the obstruction of it is a public nuisance and indictable in the same way as it is in tidal rivers.

This right of navigation is simply a right of way, similar to the right the public have to passage along a public road or footpath—a right for those persons who may require the use of it to pass as fully and freely and as safely as they have been wont to do.³ From this it would appear that this easement differs from the public right of navigation in the sea and tidal waters: for whereas, in the latter, the right is a right unlimited to pass in all parts of the channel, at all times, and in all species of vessel;⁴ in the former, the right would seem to be limited to the extent of the grant or user proved.⁵

The public who have acquired the right to navigate on an inland water have no right of property in the bed.⁶ This right of navigation does not carry with it the right of public fishery; for it has been held that neither in the case where a non-tidal river has been navigated from time immemorial,⁷ nor in the case where a river has been made navigable by Act of Parliament,⁸ has the Crown any right to the soil, or the public to the fishery, which still remains private.

It appears that the king has an interest of jurisdiction to reform and punish nuisances in all rivers, whether fresh or salt,

Right of navigation.

Obstruction of, a public nuisance.

¹ *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Bickett v. Morris*, L. R., 1 Sc. App. 47.

² *Bickett v. Morris*, *sup.*, per Lord Chelmsford. See *ante*, pp. 82 *et seq.*, and *post*, Chap. III.

³ *Orr Ewing v. Colquhoun*, 2 App. C. 839.

⁴ *R. v. Randall*, Car. & M. 496, per Wightman, J.

⁵ See further as to *Navigation*, *post*, Chap. VII.

⁶ *Orr Ewing v. Colquhoun*, *supra*.

⁷ *Murphy v. Ryan*, Ir. R., 2 C. L. 68; *Pearce v. Scotcher*, 9 Q. B. D. 162; *Smith v. Andrews*, (1899) 2 Ch. 678; see *ante*, p. 67.

⁸ *Hargreaves v. Diddams*, L. R., 10 Q. B. 582; 44 L. J., M. C. 178; 32 L. T. 600; *Musset v. Burch*, 35 L. T., N. S. 486.

that are a common passage not only for ships and great vessels, but also for smaller, as barges and boats, to reform the obstruction or annoyance that are therein to such common passage.¹

Fishery.

The right of fishery being a right of property, the presumption is that each owner of land abutting on a non-tidal stream has the right of fishing in front of his land,² *usque ad medium filum aque*; and where a man possesses land on both sides of the water, he has the sole right of fishing.

"According to the well-established principles of the common law," says O'Hagan, J., "the proprietors on either side of a river are presumed to be possessed of the bed and soil of it moiety to a supposed line in the middle, constituting their legal boundary, and being so possessed have an exclusive right to the fishery in the water which flows above their respective territories."³ This presumption, as has been said, holds good in private rivers, though subject to the public right of navigation, and a claim by the public to fish in such water has been held such a claim as cannot exist at law.⁴

If the lord of a manor would intrude his claim, he must make it out by evidence of his own—as by deed. But the presumption that a several fishery passed to the lord as appurtenant to a manor under a deed is rebutted by proof that before the date of the deed the owners of land within the manor had the right of free fishery.⁵

The owner of land on a river may grant the right of fishing to another—either exclusively, in which case the fishing is called a several fishery, or not excluding himself, in which case it would be called a free fishery. In both cases the fishery is an incorporeal hereditament, and can only pass by deed.⁶ A valid licence to fish exclusively for a time certain, even for an hour, must be by deed.⁷ Where a man has a several fishery, the presumption is that he has also the soil.⁸

¹ Hale de Jure Maris, c. 2; Williams v. Wilcor, 8 A. & E. 333; 47 R. R. 595, per Lord Denman, C. J.

² Lamb v. Newbiggen, 1 Car. & K. 549; Hale de Jure Maris, l.

³ Murphy v. Ryan, Ir. R., 2 Ch. 148. See also Mayor of Carlisle v. Graham, L. R., 4 Ex. 361, and Bristowe v. Curmican, L. R., 3 App. C. 641.

⁴ Hargreaves v. Diddams, L. R., 10 Q. B. 587; Musset v. Burch, 35 L. T., N. S. 486; Hudson v. McCrae, 4 B. & S. 585; Pearce v. Scotcher, 9 Q. B. D. 162; Smith v. Andrews, (1899) 2 Ch. 678.

⁵ Lamb v. Newbiggen, 1 Car. & K. 549. See also Grand Junction Canal v. Ashby, 7 H. & N. 403. As to right of copyholders, see Tilbury v. Silec, post, Chap. VI.

⁶ Duke of Somerset v. Fogwell, 5 B. & C. 875; 29 R. R. 449.

⁷ Holford v. Bailey, 18 Q. B. 426; 18 L. J., Q. B. 109.

⁸ See post, Marshall v. Ullewater Co., 3 B. & S. 732; Bloomfield v. Johnson, Ir. R., 8 C. L. 105. As to Fishery, see post, Chap. VI.

Lakes and Pools.

A pool is defined by *Callis* as, "a mere standing water, with
 "no current at all;" and is distinguished from a pond as being
 a work of nature, and not of art.¹ Definition.

"A pond," says *Angell*, "is a lake of small size. The outlet
 "of a lake may be a river, but the lake does not lose its distinc-
 "tive character, because there is a current in it for a certain
 "distance tending towards its outlet."²

It does not appear that by the English law there is any differ-
 ence as to the ownership of the soil between land covered with
 still and running water, except perhaps in the case of large inland
 lakes or seas, where the rule that the adjoining riparian owner
 is owner *ad medium filum aquæ*, might cause inconvenience.
 Where, therefore, a lake or pool lies wholly within, and is
 surrounded by, a manor or estate, the presumption is, that the
 owner of the manor or estate is also the owner of the soil of the
 lake; and where the boundary of two properties passes along the
 pool, it is taken to coincide with the *medium filum* of the pool;
 although, of course, it may be proved expressly to have some
 other direction.³ Ownership
of soil.

With regard to the large inland lakes in this country, the law
 seems less settled, though several modern cases have removed
 much of the doubt hitherto felt with regard to them. In the
 case of *Bristowe v. Cormican*,⁴ the House of Lords has held that
 the Crown has no *de jure* right to the soil and fisheries of large
 non-tidal navigable lakes, such as Lough Neagh in Ireland;
 Cairns, L. C., remarking that he was not aware of any rule which
 would *prima facie* connect the soil or fishing with the Crown, or
 disconnect them from the private ownership either of riparian
 proprietors or others. So far the case is clear, but it is left in
 doubt whether the presumption of ownership *ad medium filum*
aquæ, which exists with regard to owners of land on the banks
 of non-tidal streams of running water, exists also on large
 navigable lakes. In the judgment of Lord Blackburn this
 question is touched upon, and though the particular point was
 not necessary for the decision of the case, it may be well to cite
In large
navigable
lakes.

¹ *Callis* on Sewers, p. 82; *Woolrych*
 on Sewers, p. 80.

² *Angell* on Watercourses, p. 8. As to
 diversion of water from a pond by a
 sewer, see *Dukes v. Gosling*, 4 L. J., C. P.

211; 1 Bing., N. C. 589.

³ *Phear*, Rights of Water, p. 1. See
Woolrych, p. 121.

⁴ 3 App. C. 641. As to American law.
 see *Angell's* Watercourses, § 41.

at some length the words of the very learned Lord. "The property in the soil of the sea and estuaries, and of rivers in which the tide ebbs and flows, is *primâ facie* of common right vested in the Crown, but the property of dry land is not of common right in the Crown. It is clearly and uniformly laid down in our books, that where the soil is covered with water, forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to show that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. In *Marshall v. The Ulleswater Steam Navigation Co.*,¹ it is true that Mr. Justice Wightman, in delivering the judgment of the majority of the Queen's Bench, says, 'Whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquæ*, or whether it belongs *primâ facie* to the king in right of his prerogative,² it is not in this case necessary to determine; for it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishing therein, be specially appropriated to a third person, whether he has land or not on the borders thereof, or adjacent thereto.' This is the only case cited, and, as far as I can find, the only case which exists where there is even a suggestion that the Crown of common right is entitled to the soil of lakes. Neither the passage in Comyns, nor that in *Hale de Jure Maris*, cited by Mr. Justice Wightman, gives any countenance to such a doctrine. But it does appear that the learned judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water, as to justify him in unnecessarily deciding that it was the same; I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad medium filum aquæ* should apply to a lake, is a different question. It does not seem convenient that each proprietor of

¹ 3 B. & S. 732; 41 L. J., Q. B. 41;
25 L. T. 793.

² Com. Dig. Prerogative (D. 50); *Hale de Jure Maris*, c. 19.

"a few acres fronting on Lough Neagh, should have a piece of the soil of the lough, many miles in length, tacked on to his frontage." In America this question has been of more importance than in this country, but the decisions of the different States vary considerably; and with regard to the great lakes, the question has been considered more in a territorial and natural, than in a legal point of view.¹ In this country there are but few cases on the subject. In the case of *Lord v. Commissioners of Sydney*, cited before, it was held that a grant by the Crown of lands bounded by a non-navigable creek passed the soil *usque ad medium filum aquæ*.²

In *Bloomfield v. Johnson*,³ the Irish Court of Exchequer Chamber, reversing the judgment of the Court of Common Pleas, has held that a grant from King James I., who was the owner of the whole soil and bed of Lough Erne, of lands adjacent to the lake, with certain islands in it, and also a free fishery in the lakes, and all waters, watercourses, fisheries, &c., within the same, did not pass the soil of the lake, distinguishing the case from that of *Lord v. Commissioners of Sydney*, on account of the size and navigability of the lake; and Fitzgerald, B., was of opinion that, assuming that the presumption that by a grant of lands adjacent to a fresh water river (the grantees being the owners of the soil of the river) the soil of the river passes *ad medium filum aquæ*, applied to such lakes as Lough Erne, the grant of a free fishery when a several and exclusive fishery might have been granted was sufficient to rebut the presumption that the soil was intended to pass *ad medium filum aquæ*. In *Marshall v. Ulleswater Co.*, the plaintiff, who proved a grant to him of a several and exclusive fishery in the Lake of Ulleswater, was held on that account to be the owner of the soil of the lake; the majority of the Court, however, expressing a doubt whether the soil of lakes, like fresh water rivers, belonged *prima facie* to the adjoining owners or to the Crown.⁴

There seems no doubt but that the public may acquire a right Navigation.

¹ See per Dowse, B., in the same case in the Irish Court of Exchequer, Ir. R., 10 C. L. 412, and per Whiteside, C. J., in *Bloomfield v. Johnson*, Ir. R., 8 C. L. 89; Angell on Tide Waters, p. 76.

² 12 Moo., P. C. 473; 3 L. T. 1. See *ante*, pp. 16, 81 *et seq.*

³ Ir. R., 8 C. L. 89.

⁴ 3 B. & S. 732. See also *Reg. v. Barrow*, 34 Justice of Peace, p. 53. See as to this the remarks of Lindley, L. J., in *Hindson v. Ashby*, (1896) 2 Ch. 1, *ante*, p. 74. See also, as to the Norfolk Broads, *Blower v. Ellis*, 50 J. P. 326; and *Micklethwaite v. Vincent*, 67 L. T. 228, *post*, Chap. VI.

of navigation in a non-tidal lake in the same way as on a non-tidal river.¹

Fishing.

In pools and small non-navigable lakes, the right of fishing of course belongs *primâ facie* to the riparian owners *ad medium filum aquæ*. It seems somewhat doubtful, however, whether this presumption extends to large navigable lakes, or whether a public right of fishery may not exist in such waters. The Irish Court of Exchequer Chamber have held, in the case of *Bloomfield v. Johnson*,² that the public right of fishery cannot exist in non-tidal navigable lakes; and in the subsequent case of *Bristowe v. Cormican*,³ the Irish Court of Exchequer held that they were bound by this decision; but the judges in this case, both in the Court of Exchequer and in the Court of Exchequer Chamber, strongly dissented from this view of the law, though without overruling it. The case went to the House of Lords on another ground; and their Lordships, though not deciding the point, seem doubtful as to whether the decision in *Bloomfield v. Johnson* could be supported.⁴

Artificial Watercourses.

Ownership of
soil of.

We have spoken hitherto exclusively of natural bodies of water flowing *ex jure naturæ* from the earth; but it is necessary to add a few words with regard to watercourses which owe their existence to artificial means. Where an artificial watercourse is made by a man on his own land, of course no question as to the ownership of the soil of it, or the rights over it, can arise; but the case will be different where such a watercourse is made on the land of another. In such a case the right to the watercourse can only be created by grant or by long continued enjoyment, from which the existence of a former grant may be reasonably presumed,⁵ or by Act of Parliament.⁶ "A grant "of a watercourse in law may," says Jessel, M. R., "mean one "of three things, especially when coupled with other words. It "may mean the easement, or the right to the running of water; "and it may mean the channel, pipe or drain which contains the

¹ See *Marshall v. Ulleswater Co.*, 3 B. & S. 732; *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68; *Bristowe v. Cormican*, 3 App. C. 641; *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 582; and *post*, Chap. VII.

² Ir. R., 8 Ch. 68.

³ Ir. R., 10 C. L. 398, 412.

⁴ 3 App. Cas. 641. See also *Reg. v.*

Barrow, 34 Just. of Peace, 53; *Pery v. Thornton*, 23 L. R., Ir. 402; *Blower v. Ellis*, 50 J. P. 326; *Micklethwaite v. Vincent*, 67 L. T. 228; and *post*, Chap. VI.

⁵ See *Rameshkur Singh v. Koonj Behari Pattuok*, 4 App. Cas. 121.

⁶ See *Mason v. Shrewsbury Rly.*, L. R., 6 Q. B. 586, per Cockburn, C. J.

“water ; and it may mean the land over which the water flows. Which it does mean must be shown by the context ; and if there is no context, I apprehend that it would not mean any-thing but the easement or right to the flow of the water.”¹ The right, therefore, to the ownership of the bed of such water-courses depends entirely on the words of the instrument which creates them, interpreted according to the usual rules of construction.² The most important of these artificial watercourses—viz., canals, sewers, and waterworks—are wholly the creatures of statute ; and the rights of property in them of course depend on, and are regulated in each case by, the individual statute to which it owes its origin, and by those statutes which apply to such works generally. The full consideration of such artificial watercourses will be given in a later chapter.³

¹ *Taylor v. St. Helens*, 6 Ch. D. (C. A.) 264.

² *Budger v. Yorkshire Rail. Co.*, 28 L. J., Q. B. 118 ; 7 Jur., N. S. 459.

³ See as to rights in artificial water-courses, *post*, Chap. IV., and, as to canals, *post*, Chap. V.

CHAPTER III.

OF NATURAL RIGHTS OF WATER, AND THEREIN OF THE
DUTIES OF RIPARIAN OWNERS.*Natural Rights and Duties of Riparian Owners.*

Riparian
rights gene-
rally.

HITHERTO we have treated almost exclusively of the ownership of the soil over which water flows, and of those rights incident to and arising out of the ownership of soil. In the present chapter we purpose to consider what are usually termed riparian rights, or rights of proprietors of land on the banks of streams, arising, strictly speaking, not from the ownership of the bed over which the water flows, but from the right of access which such proprietors have to the water. In the case of non-tidal waters, where the owner of land on the banks is *primâ facie* owner of half the bed, this may appear a fine-drawn distinction; but on the banks of tidal waters, where the ownership of the bed is *primâ facie* in the Crown, the distinction will be manifest—as the origin of such rights cannot be referred to ownership of the bed.

Founded on
the right of
access to the
stream.

“With respect to the ownership of the bed of the river,” says Lord Selborne in *Lyon v. Fishmongers’ Company*,¹ “this cannot be the natural foundation of riparian rights properly so called, because the word ‘riparian’ is relative to the bank, and not to the bed, of the stream; and the connection, when it exists, of property on the bank with property in the bed of the stream depends not upon nature, but on grant or presumption of law. In some tidal navigable rivers (as the Severn), parts of the bed of the tidal stream belong to riparian owners; and it appears from Mr. Angell’s book (often quoted in our Courts), that in Pennsylvania and Alabama, States whose jurisprudence is founded generally on English law, the whole property in the beds of large non-tidal navigable rivers is in the State. The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of

¹ 1 App. Cas. 683; 45 L. J., Ch. 68; 35 L. T. 569.

“the stream, which can only be appropriated by severance, and
 “which may be lawfully so appropriated by every one having a
 “right of access to it.”

The principles of law to be hereafter stated apply to all water-courses flowing in a certain and definite channel, whether above or below ground; for if the course of a subterranean stream be well known, the rights with regard to it will be the same as if it had been wholly above ground. But waters, whether above or below ground, having no certain course or defined limits, such as those merely percolating through the strata of the earth, and those diffused over its surface, are not watercourses, nor are they subject to the law of watercourses.¹ The law relating to percolating water, and water without a defined course, will be considered at the end of this chapter.

Only exist as to waters flowing in a defined channel.

It is manifest that the property of riparian owners may exist on the banks of tidal navigable rivers as well as on non-navigable streams. Riparian owners on the former have similar rights and natural easements to those belonging to riparian proprietors above the flow of the tide, underlying and controlled, though not extinguished, by the public right of navigation.² This latter right the proprietor on a navigable river enjoys, “superadded to “his riparian rights.” His riparian rights are subordinated to the public right “in this respect, that whereas in a non-navigable “river all the riparian owners might combine to divert or pollute “or diminish the stream; in a navigable river, the public right “of navigation would intervene and prevent this being done.”³

Rights on navigable and non-navigable rivers identical, save where controlled by public right of navigation.

A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water power, as derived from a reservoir artificially formed by a dam across its channel, and sell the same along with and as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground.⁴ Such a power, however, could not be exercised if it interfered in any way with the public right of navigation, which is paramount to all private rights.⁵

¹ *Chasemore v. Richards*, 7 H. L. 349; 29 L. J., Ex. 81; *Acton v. Blundell*, 12 M. & W. 324; 13 L. J., Ex. 289; *Dickenson v. Grand Junction Canal*, 7 Ex. 282; and *post*, pp. 188 *et seq.* For definition of a “watercourse,” see *ante*, pp. 58 *et seq.*

² *Lyon v. Fishmongers' Company*, 1 App. Cas. 662; 45 L. J., Ch. 68; 35 L. T. 569; *North Shore Rly. v. Pion*, 14 App. Cas. 612; *Booth v. Rattle*, 15

App. Cas. 188; 62 L. T. 198; 59 L. J., P. C. 91.

³ *Lyon v. Fishmongers' Company*, 1 App. Cas. 662, per Lord Cairns, L. C. Compare *Orr Ewing v. Colquhoun*, 2 App. Cas. 656.

⁴ *Hamelin v. Bannerman*, (1895) A. C. 237.

⁵ *Gunn v. Free Fishers of Whitstable*, 11 H. L. 192, and cases in Chap. VII., *post*.

Contact
necessary.

"It is of course," says Lord Selborne,¹ "necessary to the existence of such riparian rights that the land should be in contact with the flow of the stream, but lateral contact is as good *jure nature* as vertical, and not only the word 'riparian,' but the best authorities, such as *Miner v. Gilmour*,² and Lord Wensleydale in *Chasemore v. Richards*,³ state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right."

In tidal
rivers.

Natural right
to water not
an easement.

A watercourse may be either natural or artificial, and the rights of the riparian proprietors on the banks thereof are in the one case corporeal, and in the other incorporeal rights. The right to the use of the flow of the water in its natural course, and to the momentum of its fall on the land of the proprietor, is not what is called an easement, because it is inseparably connected with and inherent in the property in the land: it is parcel of the inheritance, and passes with it.⁴

Artificial
watercourses.

Where a stream is artificial, that is, does not arise *ex jure nature* from the soil, or flows in a channel cut by artificial means through the lands of adjoining proprietors, the rights of such proprietors are not *primâ facie* the same as those of proprietors on the banks of natural streams. The mutual rights of the parties in such cases are not natural, but acquired rights, and are dependent for their existence entirely on the words of the grants by which they have been acquired, or on the nature of the user, which can be proved if the claim is by prescription.⁵ A watercourse, however, though an artificial one, may have been made under such circumstances as to confer all such rights as a riparian owner would have had in the case of a natural stream.⁶ Moreover, the natural rights to water are liable to be abridged, enlarged or modified in many ways by grant or prescription. Thus a right may be acquired to throw back upon the land of the

Acquired
rights.

¹ *Lyon v. Fishmongers' Company*, 1 App. Cas. at p. 683; *North Shore Rly. v. Pion*, 14 App. Cas. 612.

² 12 Moo., P. C. 131.

³ 7 H. L. C. 349.

⁴ Angell on Watercourses, pp. 96, 98; Woolrych on Waters, p. 146.

⁵ Phear, Rights of Water, p. 39. See

remarks of Bowen, L. J., in *Chamber Colliery Co. v. Hopwood*, *post*, p. 249.

⁶ See *Rameshur Pershad Singh v. Koonj Behari Pattuck*, 4 App. Cas. 121; *Wood v. Wand*, 3 Ex. 748; *Sutcliffe v. Booth*, 32 L. J., Q. B. 136; 9 Jur., N. S. 1037, and cases *post*, pp. 250 *et seq.*

proprietor higher up the stream the water which, unless so reflected, would by the force of gravity pass from it; or to discharge the water upon the land lying lower down the stream either injured in quality, or with a degree of force greater or less than the natural current.¹ All such acquired rights are termed easements. It is purposed in the present chapter to consider the natural rights of water only, leaving to a subsequent chapter all acquired rights.²

"The subject of right to streams of water flowing on the "surface," says Lord Wensleydale,³ "has been of late years "fully discussed, and, by a series of carefully considered judgments, placed upon a clear and satisfactory footing. It has been "settled that the right to the enjoyment of a natural stream of "water on the surface *ex jure nature* belongs to the proprietor "of the adjoining lands, as a natural incident to the right to the "soil itself; and that he is entitled to the benefit of it, as he is "to all the other advantages belonging to the land of which he "is the owner. He has the right to have it come to him in its "natural state, in flow, quantity and quality, and to go from "him without obstruction, upon the same principle that he is "entitled to the support of his neighbour's soil for his own in "its natural state. His right in no way depends on prescription "or the presumed grant of his neighbour."

Rights in
natural
streams,

not founded
on occupancy.

It was at one time contended that a title to the use of running water was not a right of property; but that water was *publici juris*, and, as such, the right to use it could only be acquired by occupancy. This view seems to have been favoured by Blackstone,⁴ and there are dicta in some of the earlier cases⁵ to the effect that by the law of England the possessor who first appropriates any part of water flowing through his land to his own use, has a right to use so much as he has appropriated as against the world. The cases of *Mason v. Hill* and *Embrey v. Owen* have now, however, finally negatived this contention.

In *Mason v. Hill*,⁶ Lord Denman, delivering the judgment

Mason v. Hill.

¹ *Sampson v. Hoddinot*, 1 C. B., N. S. p. 611; 26 L. J., C. P. 148. See Gale on Easements, p. 270; Goddard on Easements, p. 53.

² *Post*, Chap. IV.

³ *Chasemore v. Richards*, 7 H. L. C. 382; 29 L. J. Ex. 81. See also *Embrey v. Owen*, 6 Ex. 353; *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Wright v. Howard*, 8. & St.

190; 24 R. R. 169.

⁴ 2 Black. Com. 402. As to the Dutch-Roman Law on this point as practised in Cape Colony, see *French Hoek v. Hugo*, 10 App. Cas. 336; 54 L. T. 92.

⁵ *Williams v. Morland*, 2 B. & C. 913; 26 R. R. 579; *Liggins v. Inge*, 7 Bing. 692; 33 R. R. 615.

⁶ 5 B. & A. 1; 39 R. R. 354.

of the Court of King's Bench, says, "The proposition for which the plaintiffs contend is that the possessor of land, through which a natural stream runs, has a right to the advantage of that stream flowing in its natural course, and to use it when he pleases for any purpose of his own, not inconsistent with a similar right in the proprietors of the land above and below; that neither can any proprietor above diminish the quantity or injure the quality of water which would otherwise descend, nor can any proprietor below throw back the water without his licence or grant; and that whether the loss by diversion of the general benefit of such stream be or be not such an injury in point of law as to sustain an action without some special damage, yet as soon as the proprietor of land has applied it to some purposes of utility, or is prevented from so doing by the diversion, he has a right of action against the person diverting. The proposition of the defendant is, that the right to flowing water is *publici juris*, and that the first person who can get possession of the stream and apply it to a useful purpose, has a good title to it against all the world, including the proprietor of the land below, who has no right of action against him unless such proprietor has already applied the stream to some useful purpose also, with which the diversion interferes; and in default of his having done so, may altogether deprive him of the benefit of the water. The position that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in this sense, that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in other cases of injuries to real property, possession is a good title against a wrongdoer, and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill: (*The Earl of Rutland v. Bowler*.¹) But it is a very different question whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil even when unapplied, and deprive him of it altogether by anticipating him in its application to a useful purpose. If this be so, a considerable part

¹ Palmer, 290.

“of the value of an estate, which, in manufacturing districts particularly, is much enhanced by the existence of an unappropriated stream of water with a fall, within its limits, might at any time be taken away; and by parity of reasoning, a valuable mineral or brine spring might be abstracted from the proprietor in whose land it arises, and converted to the profit of another. We think that this proposition has originated in a mistaken view of the principles laid down in the decided cases of *Bealey v. Shaw*,¹ *Saunders v. Newman*,² *Williams v. Morland*.³ It appears to us also that the doctrine of Blackstone and the dicta of learned judges, both in some of those and in the case of *Cox v. Mathews*,⁴ have been misconceived.” The learned judge proceeds to discuss the above cases, and the passage in Blackstone,⁵ and the Roman law⁶ on the subject, and then continues, at p. 24: “From these authorities, it seems, that the Roman law considered running water, not as *bonum vacans*, in which any one might acquire a property, but as public or common, in *this sense only*, that all might drink of it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he has the possession; and during the time of such possession only. We think that no other interpretation ought to be put upon the passage in Blackstone, and that the dicta of the learned judges above referred to, in which water is said to be *publici juris*, are not to be understood in any other than this sense; and it appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant (though he may be the proprietor of the land above) has any right, by diverting the stream, to deprive the owner of the land below of the special benefit and advantage of the natural flow of the water therein.”

“The right,” says Parke, B.,⁷ “to have a stream flow in its natural state, without diminution or alteration, is an incident of property in the land through which it passes; but flowing

¹ 6 East, 208; 8 R. R. 466.

² 1 B. & A. 258; 19 R. R. 312.

³ 2 B. & C. 910; 26 R. R. 579.

⁴ 1 Ventr. 137.

⁵ Commentaries, vol. ii. pp. 14, 18.

⁶ 2 Inst. tit. 1, s. 1; Dig., bk. 43, tit.

13.

⁷ *Embrey v. Owen*, 6 Ex. 353; 20 L. J., Ex. 212. See 3 Kent's Comm., sect. 52, p. 439; see also *Wright v. Howard*, 1 Sim. & S. 190; 24 R. R. 169.

“water is *publici juris*, not in the sense that it is *bonum vacans*, “to which the first occupant may acquire an exclusive right, but “that it is public and common in this sense only, that all may “reasonably use it who have a right of access to it, and that “none can have any property in the water itself, except in the “particular portion which he may choose to abstract from the “stream and take into his possession, and that during the time “of his possession only. But each proprietor has the right to “the usufruct of the stream which flows through his land.”

Obstruction
of rights
actionable.

The right to the flow of running water, without diminution or alteration, being common to all those through whose land it flows, any unauthorized interference with or use of the water, to the prejudice of one entitled to its use, is the subject of an action for damage,¹ and may be restrained by injunction.

This right, however, is not an absolute and exclusive right to the flow of *all* the water, but only subject to the right of other riparian owners to the reasonable enjoyment of it, and consequently it is only for an unreasonable and unauthorized use of this common benefit that an action will lie, though where there is an injury to a right, actual perceptible damage is not necessary to maintain it.²

Not limited
by present
enjoyment.

The rights of riparian owners existing, as has been said, *ex jure nature*, and not depending on any presumed grant from the other riparian owners, are not limited by the present mode of enjoyment, and a new mode of enjoyment gives a right at once to sue for an injury done in respect of such new uses.³

“All persons,” says Cresswell, J., “having lands on the “margin of a flowing stream, have, by nature, certain rights “to use the water of that stream, whether they exercise those “rights or not; and they may begin to exercise them when “they will.”⁴

Thus, in *Mason v. Hill*,⁵ cited above, the proprietor of a mill having appropriated the water of a stream to the use of a mill newly erected, was held entitled to recover from a proprietor

¹ See *Grand Junction Canal v. Shugar*, L. R., 6 Ch. 483.

² *Embrey v. Owen*, 6 Ex. 353. See also 3 Kent's Comm., sect. 52, p. 430; *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769; 46 L. J., Ch. 773; 37 L. T. 149; *St. Louis v. St. Louis*, 3 Moo., P. C. 298; *Frankum v. Falmouth*, 4 L. J., K. B. 26; 2 A. & E. 452; and cases *post*, pp. 122, *et seq.*

³ *Holker v. Porrit*, L. R., 10 Ex. 59; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Pennington v. Brinsop Hall Co.*, 5 Ch. Div. 769; *Chasemore v. Richards*, 7 H. L. 382; *A.-G. v. Birmingham*, 4 De G. & J. 528.

⁴ *Sampson v. Hoddinot*, 1 C. B., N. S. 590.

⁵ 5 B. & A. 1; 39 R. R. 354.

higher up the stream damages for the injury to his mill occasioned by the wrongful diversion of the stream, although before the mill was built the wrongdoer could only have been liable to nominal damages. "It is the necessary effect of every appropriation of running water to a new and beneficial use, that a wrongful diversion or abstraction entails a larger measure of liability."¹

Where the continuance of a wrongful act causes fresh damage, the continuance of the wrongful act which caused the damage constitutes a fresh cause of action.² Thus where prior to 1866 a stream was conveyed by a canal company under and across a canal through two wooden tunnels for which in 1866 the company substituted metal tunnels of less capacity, in consequence of which after heavy rains the stream in 1873 flooded the plaintiff's land, the Irish Court of Common Pleas held that the substitution of the smaller for the larger tunnels was in its inception an innocent act, without either *injuria* or *damnum*, and only became tortious upon the subsequent flooding, and that the Statute of Limitations began to run from the time of the flooding in 1873. On appeal the Exchequer Chamber affirmed this decision, but on a different ground, holding that the obstruction to the stream in 1866 was a wrongful act, and the continuance of the wrongful obstruction causing fresh damage in 1873, constituted a fresh cause of action in 1873, and that therefore the Statute of Limitation applicable to the case began to run from the time of the damage in 1873.³

It would seem that the rights of a riparian proprietor, with respect to a stream, are limited only by those of persons in a similar or analogous position with himself.⁴ Thus, where the same person is proprietor of the ground on both sides of a non-navigable stream, he can change a channel as he pleases, provided he restores the water to the old channel before it leaves his ground, and provided that it flows out of his ground into the lands below as it was wont to do, neither increased nor diminished in quantity, quality, or direction.⁵ In the case of *Whaley v.*

Limited only by rights of persons in similar position.

¹ Per Lush, J., delivering judgment of the Exchequer Chamber in *Holker v. Porrit*, L. R., 10 Ex. 59; 44 L. J., Ex. 52; 33 L. T. 123, *post*, p. 119.

² *Devey v. Grand Canal Co.*, Ir. R., 8 C. L. 511.

³ Ir. R., 9 C. L. 194.

⁴ Per Channell, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 13; 36 L. J., Ex. 1; 15

L. T. 313. Mere possession of rights corporeal and incorporeal, however, is sufficient to maintain an action against a wrongdoer: *Pullan v. Roughfort Bleaching Co.*, 21 L. R., Ir. 73; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Nuttall v. Bracewell*, L. R., 2 Ex. 1.

⁵ Per Lord Blackburn, *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

Laing,¹ it was held that the mere possession or taking of water by a person not a riparian owner is not sufficient to enable the possessor to maintain an action for polluting it. In the case of *The Stockport Waterworks Co. v. Potter*,² where the plaintiffs, a water company, who had by grant a right to take water from the Mersey, for supplying the inhabitants of Stockport with water, brought an action against defendants for polluting such water; it was held by Pollock, C. B., and Channell, B.,—Bramwell, B., *diss.*,—that the rights which a riparian owner has with respect to the water are entirely derived from his possession of land abutting on the stream, and that if by a deed which conveys only land not abutting on the stream he affects to grant water rights, such grant, though valid against the grantor, can create no rights for an interruption of which the grantee can sue a third party. In the subsequent case of *Nuttall v. Bracewell*,³ this view is confirmed by the majority of the Court of Exchequer.

In the case of *Ormerod v. The Todmorden Mill Co.*⁴ the question raised in *Stockport Waterworks Co. v. Potter* was again considered, and the Court of Appeal held that a riparian owner cannot except as against himself confer on one who is not a riparian owner any right to use the water of a stream, and that any user by a non-riparian proprietor even under a grant from a riparian proprietor is wrongful if it sensibly affects the flow of the water by the land of other riparian proprietors.

In the case of *Kensit v. Great Eastern Rail. Co.*,⁵ where the owner of land not abutting on a river with the license of a lower riparian owner took water from the river, and after using it for cooling certain apparatus returned it to the river unpolluted and undiminished, the Court of Appeal held, affirming Pollock, B., that the lower riparian owner could not obtain an injunction against the higher riparian owner or his licensee. Remark-
ing on the cases cited in argument, Lindley, L. J., says, at p. 136: "*Stockport Waterworks Co. v. Potter*² simply decides
"that the grantee of a riparian proprietor must take the water
"as he finds it. . . . In *Ormerod v. Todmorden Joint Stock*
"*Mill Co.*⁴ the decision was that the grantee of a riparian

¹ 3 H. & N. 675; Ex. Ch., 2 H. & N. 476. See per Bramwell, B., in *Stockport v. Potter*, 3 H. & C. 300.

² 3 H. & C. 300; 10 L. T. 748.

³ L. R., 2 Ex. 1. See also *Crossley v.*

Lightowler, L. R., 2 Ch. 478.

⁴ 11 Q. B. D. 155.

⁵ 27 Ch. D. 122; 54 L. J. Ch. 19; 15 L. T. 862.

“proprietor could not take water and return it in a state so as to do injury to those below him. . . . Neither of these cases decides that a licensee or grantee of a riparian proprietor cannot take any water from the stream; they decide nothing of the sort, nor do they warrant any such inference.”

In certain exceptional cases there may exist an absolute right to the whole of the water of a stream, so as to entitle a man to sue for the division of any part of it.¹ Thus in *Holker v. Porrit*,² where a natural stream had been divided immemorially, and one branch ran into a farmyard where it supplied a trough, and the overflow from the trough was formerly diffused and discharged itself by percolation, and the owner connected the trough with reservoirs, and used the surplus water for a mill; it was held that this grantee could maintain an action against an upper riparian proprietor on the stream above the diversion for obstructing the flow of the water. Lush, J., delivering the judgment of the Court, said: “The water which came down to him at the farm was his own, to use it how he pleased. There was no one entitled to share with him in its use, and no one who could call him to account for any use he chose to make of it. In this respect his position was different from that of a riparian owner, who only shares the use of the water with other riparian owners. In collecting the overflow at the trough and conveying it to the mill he clearly did nothing in derogation of the rights of any other person, or which he was not entitled to do in the lawful use and enjoyment of his own property; nor did he thereby lose any right which he then before had. While the water overflowed the trough and ran to waste, he had a right to complain of any undue diversion or obstruction of the stream which diminished the accustomed supply to the trough, and he acquired no greater right by conveying it to the mill. No doubt the consequences to a wrongdoer became more serious after the drain was made than they were before, because the wrongful act was more injurious, and larger damages would have been paid for it; but it is a fallacy to say that a man’s rights are abridged, if, when he abuses them, he has to make larger compensation.”³

Sole right to water.

¹ As by Act of Parliament. See *post*, p. 120. As to sole rights to water under the Roman-Dutch Law of Cape Colony, see *French Hoek Commissioners v. Hugo*, 10 App. Cas. 336; 54 L. T. 92; and

Breda v. Silberbauer, L. R., 3 P. C. 84.

² L. R., 10 Ex. 59 (Ex. Ch.); L. R., 8 Ex. 107; 44 L. J., Ex. 52; 33 L. T. 125.

³ *Holker v. Porrit*, L. R., 10 Ex. 59;

Special statutory property in water.

In the case of *Medway Co. v. Earl of Romney*,¹ the plaintiffs were incorporated by Act of Parliament for the purpose of making the Medway navigable; and "the said river and streams "so as to be made navigable, and all lands, &c. to be used for "the benefit of the navigation were vested in the company for "ever." The defendants constructed works on the river, and raised water from the river to supply a county lunatic asylum and gaol not on riparian lands. On action brought for this diversion, the Court held that the action would lie. Mr. Justice Willes says, delivering the judgment of the Court: "Looking to "the objects which were contemplated by the Acts of Parliament, "to which our attention has been directed, we cannot construe "the statute 13 Geo. II. c. 26, s. 2, as giving the plaintiffs any "such a limited right in the river as a private grant of the 'said " 'river and stream' might have conveyed, but as creating a new "species of statutory property and interest in the water, which, "in our opinion, was interfered with by the abstraction of it for "the purposes to which it was applied by the defendant; which "purposes were more extensive than those for which a riparian "proprietor, as such, could insist upon appropriating the stream "as it passed by his land. In our view of the true construction "of the Act of Parliament, it is not necessary that there should "be an actual damage to the navigation; because we think that "the legislature intended to give the company such an interest "in all the water of the river for the purposes of the navigation "as is interfered with by the abstraction of any part thereof. "Whether or not the riparian proprietors can exercise, for the "benefit of their land adjoining the river, the rights which "ordinarily belong to such proprietors, it is unnecessary to "express an opinion."

Natural right to flow of water.

It is proposed now to consider the natural rights of riparian owners to the flow of water through or past their lands, and the injuries which may be sustained by them by a wrongful interference with such flow so as to injuriously affect—1st. The natural *quantity* of the water—as by diversion and obstruction; and 2ndly. The natural *quality* of the water—as by pollution.²

and see *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Orr Ewing v. Colquhoun*, 2 App. Cas. 584.

¹ 9 C. B., N. S. 575. See *Rochdale Canal v. King*, 14 Q. B. 122.

² The right of access which a riparian owner has on a navigable river, from his land to the river, for the purpose of exercising the public right of navigation, is treated of in Chap. II., p. 93.

The Right to Water in its Natural Quantity.

A riparian owner in a natural stream is, in the absence of a prescriptive right to the contrary, entitled to have the water flow to him in its natural state, so far as that may be a benefit to him—as, for instance, to turn his mill¹ and water his cattle; and he is bound to submit to receive the water, so far as it is a nuisance by its tendency to flood his lands.² “By the general law applicable to running streams,” says Lord Kingsdown,³ “every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land—for instance, Ordinary use.
“to the reasonable use of the water for his domestic purposes
“and for his cattle; and this without regard to the effect which
“such use may have in case of a deficiency upon proprietors
“lower down the stream.”

With regard to what is meant by “domestic purposes,” Lord Domestic purposes.
Romilly, M. R., says, in *A.-G. v. Great Eastern Railway*,⁴ that the term “unquestionably would extend to culinary purposes; to
“the purposes of cleansing and washing, feeding and supplying
“the ordinary quantity of cattle, and so on;” but he held that a railway company, as riparian owners, were not entitled to take water for the purpose of watering their engines so as to injuriously affect the navigation of a stream, such use not being a “domestic use,” and, moreover, that the fact that the railway company did not require the water for domestic uses did not entitle them to take it for other purposes of a different character.⁵ The washing of carriages has been held to be a domestic use under a local Act of Parliament regulating a water company.⁶ “Brewing” would also appear to be a domestic use.⁷

“But every riparian proprietor has also a further right to the Extraordi-
“use of the water for any purpose, or what may be deemed the nary use—
“extraordinary use of it, provided he does not interfere thereby mills, irriga-
tion;

¹ See *Frankum v. Fulmouth*, 2 A. & E. 452; 4 L. J., K. B. 26.

² Per Blackburn, J., in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 582; 40 L. J., Q. B. 293; 25 L. T. 239.

³ *Miner v. Gilmour*, 12 Moo., P. C. 131; 3 L. T. 98; cited with approval by Lord Blackburn in *French Hoek Commissioners v. Hugo*, 10 App. Cas. 336; 54 L. T. 92; *Swindon Water Co. v. Wilts Canal Co.*, L. R., 7 H. L. 697; L. R., 9 Ch. 451; *Embrey v. Owen*, 6 Ex. 353; *Chasemore v. Richards*, 7 H. L. 349; *Sampson v. Hoddinot*, 1 C. B., N. S.

590; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Wright v. Howard*, 1 S. & S. 190; 24 R. R. 169; *Earl of Norbury v. Kitchin*, 3 F. & F. 292; 9 Jur., N. S. 132. ⁴ 23 L. T., N. S. 344; affirmed L. R. 6 Ch. 572.

⁵ See *Earl of Sandwich v. Great Northern Railway*, 10 Ch. D. 707, and post, p. 124.

⁶ *Busby v. Chesterfield Water Co.*, E., B. & E. 176.

⁷ Per James, L. J., in *Wilts and Berks Canal v. Swindon Water Co.*, L. R., 9 Ch. 457.

"with the rights of other proprietors either above or below. Subject to this condition he may dam it up for the purpose of a mill,¹ or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury."²

must be
reasonable ;

*Swindon
Water Co. v.
Wilts and
Berks Canal.*

Such "extraordinary use," in order to be justifiable, however, must be a reasonable use, and one for which a riparian proprietor is entitled to take the water from its natural course;³ for where an unreasonable use is made of the water by one riparian proprietor, the others are entitled to have it restrained, even though they prove no actual damage, on the ground that it is an interference with a right which unless restrained would in the course of twenty years confer on the claimant a right by prescription in derogation of the prior right.⁴ The law on this point is very clearly stated by Cairns, L. C., in the case of *The Swindon Water Co. v. Wilts and Berks Canal*.⁵ In this case the directors of a waterworks company purchased a mill on the upper part of a stream, and so became riparian owners. They not only used the water for the purposes and in the manner allowed by the law to every riparian owner, but collected it into a permanent reservoir for the supply of an adjacent town, and claimed, as their legal right, such user of it. The House of Lords held that the use of the water was not a reasonable use such as could justifiably be made by an upper riparian owner, and that a canal company, who were riparian owners below, were entitled to an injunction to restrain this use of the water. "Undoubtedly," says Lord Cairns, "the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use it; that is quite consistent with the right of the upper owners also to use the water for all ordinary purposes, viz., as has been said, *ad lavandum et ad*

¹ See *Belfast Rope Works v. Boyd*, 21 L. R., Ir. 560; *Ward v. Robbins*, 15 M. & W. 237.

² *Miner v. Gilmore*, 12 Moore, P. C. C. 131; 3 L. T. 98; *French Hoek Commissioners v. Hugo*, 10 App. Cas. 336; 54 L. T. 92. See also *Chusemore v. Richards*, 7 H. L. 349; *Embrey v. Owen*, 6 Ex. 353; 3 Kent's Comm., sect. 52, pp. 439—445, cited in *Embrey v. Owen*, *sup.*, at p. 369; and *Tyler v. Wilkinson*, 4 Mason's U. S. Rep. 400, per Story, J.

³ Per James, L. J., in *Wilts and Berks*

Canal v. Swindon Water Co., L. R., 9 Ch. 457.

⁴ L. R., 7 H. L. 697.

⁵ *Swindon Water Co. v. Wilts Canal*, L. R., 7 H. L. 697; 45 L. J., Ch. 638; 33 L. T. 513; *Grand Junction Canal v. Shugar*, L. R., 6 Ch. 577; *Embrey v. Owen*, 6 Ex. 353, per Parke, B.; *Elwell v. Crowthor*, 31 Beav. 163; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Rochdale Canal v. King*, 2 Sim., N. S. 79.

“*potandum*, whatever portion of the water may be thereby
 “exhausted and may cease to come down by means of that use.
 “But further, there are uses, no doubt, to which the water may
 “be put by the upper owner, *e.g., uses connected with the tenement* and con-
 “of that upper owner. Under certain circumstances, and pro-
 “vided no material injury is done, the water may be used and
 “may be diverted for a time by the upper owner for the purpose
 “of irrigation. This may well be done, and the exhaustion of
 “the water which may thereby take place may be so incon-
 “siderable as not to form a subject of complaint by the lower
 “owner; and the water may be restored, after the object of
 “irrigation is answered, in a volume substantially equal to that
 “in which it passed before. Again, it may well be, that there
 “may be a use of the water by the upper owner for, I will say,
 “manufacturing purposes, so reasonable that no just complaint
 “can be made on the subject by the lower owner. Whether
 “such a use in any particular case could be made for manufac-
 “turing purposes, connected with the upper tenement, would. I
 “apprehend, depend upon whether the use was a reasonable
 “use. Whether it was a reasonable use would depend, at all
 “events, in some degree, on the magnitude of the stream from
 “which the deduction was made for this purpose over and above
 “the ordinary use of the water. But my Lords and your Lord-
 “ships will find that in the present case you have no difficulty
 “in saying whether the use which has been made of the water
 “by the upper owner comes under the range of these autho-
 “rities, which deal with cases such as I have supposed—cases
 “of irrigation and cases of manufacture. Those were cases
 “where the use made of the stream by the upper owner has
 “been for purposes connected with the tenement of the upper
 “owner. But the use which here has been made by the appel-
 “lants, and the use which they claim the right to make of it, is
 “not for the purpose of their tenements at all, but is a use
 “which virtually amounts to a complete diversion of the stream
 “—as great a diversion as if they had changed the watershed
 “of the country, and in place of allowing a stream to flow
 “towards the south, had altered it near its source so as to make
 “it flow towards the north. My Lords, that is not a user of the
 “stream that could be called a reasonable user by the upper
 “owner; it is a confiscation of the rights of the lower owner; it
 “is an annihilation, so far as he is concerned, of that portion

“ of the stream which is used for those purposes, and is done
 “ not for the sake of the tenement of the upper owner, but that
 “ the upper owner may make gains by alienating the water to
 “ other parties who have no connection with any part of the
 “ stream. It is a matter quite immaterial whether, as riparian
 “ owner of Wayte’s tenement, any injury has now been sus-
 “ tained, or has not been sustained, by the respondents. If the
 “ appellants are right, they would at the end of twenty years, by
 “ the exercise of this claim of diversion, entirely defeat the
 “ incident of the property—the riparian right of Wayte’s tene-
 “ ment. That is a consequence which the owner of Wayte’s
 “ tenement has a right to come into the Court of Chancery to
 “ get restrained at once by injunction or declaration, as the case
 “ may be.”

From this case it would seem that an “ extraordinary use,” as well as being reasonable, must be for the use of the riparian tenement.¹ This point does not appear to have been pressed in the case of *Earl of Norbury v. Kitchin*,² where it was held that a riparian owner had a right by means of water-wheels and machinery to pump water from a stream flowing past his land to a reservoir, and to convey it thence to his dwelling-house on another estate, and there to apply it to his domestic use and other purposes of utility, provided he took only a reasonable quantity with reference to the size of the stream—but that he had no right to take by means of machinery more water than he would have a right to otherwise.

In *Earl of Sandwich v. Great Northern Rail. Co.*,³ Bacon, V.-C., held that a railway company, as riparian owners, were entitled to take a reasonable quantity of water for supplying their engines, and for the several purposes of their station, returning what they did not want to the stream, and dismissed a bill by a mill-owner lower down the stream, who failed to prove any damage to his mill by the abstraction.

In *Owen v. Davies*⁴ it was held, following the *Swindon case*, that a local board of health who had purchased a piece of land adjoining a brook for the purpose of obtaining water for their reservoir had only the ordinary rights of a riparian proprietor

¹ As to this see *Nuttall v. Bracewell*, L. R., 2 Ex. 1; *Stockport Water Co. v. Potter*, 3 H. & C. 300, and *ante*, pp. 117, 120.

² 3 F. & F. 292; 9 Jur., N. S. 132; 7

L. T. 685.

³ 10 Ch. Div. 707. See *Kensit v. Gt. East. Rly. Co.*, *ante*, p. 118.

⁴ W. N. (1874) 175.

and could not divert the water so as to injuriously affect the land of another riparian owner. In the case of *Roberts v. Gwyrfai District Council*¹ the Court of Appeal held, affirming Kekewich, J., that under sect. 51 of the Public Health Act, 1875, a local authority have no power for the purpose of supplying water to their district, to alter the flow of water in a stream, without the consent in writing of the riparian proprietors lower down the stream, as required by sect. 332 of the Act, and that by so altering the flow of water the local authority are, within the meaning of sect. 332, "injuriously affecting" the common law right of such a riparian proprietor, and they will be restrained from so doing without any proof of sensible damage caused to him.

A riparian owner is therefore at liberty to pen back and divert² temporarily the waters of a stream flowing through his lands in a reasonable way, and for reasonable purposes connected with his tenement, provided he does not thereby injure his neighbours, and no action will lie for such obstruction unless the complainant can prove actual damage.³ Where, however, the purpose for which the water is taken is not reasonable, or not a use connected with the riparian tenement, the taking it is an invasion of a right of property; and whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the violation of the right, and the law will presume damage.⁴

Whether a riparian proprietor may use the water of a stream for the purposes of irrigation, if he again return it to the stream with no other diminution than that caused by the evaporation and absorption attendant on irrigation, appears to depend on the circumstances of each particular case. Thus in *Embrey v. Owen*,⁵ where it was proved that the diversion was not continuous, and that it caused no diminution cognizant to the senses, the Court held that this was not under the circumstances such an unreasonable use as to be prohibited by law. Where

Irrigation.

¹ (1899) 2 Ch. 608; 68 L. J., Ch. 757; 81 L. T. 445; 48 W. R. 51.

² A count for diverting and turning a stream held not to be supported by proof of penning back and checking its course whereby the water was made to overflow plaintiff's meadow: *Griffiths v. Mann*, 6 Price. 1.

³ *Williams v. Morland*, 2 B. & C. 910;

26 R. R. 579; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Eddleston v. Crossley*, 18 L. T. 15.

⁴ *Embrey v. Owen*, 6 Ex. 353, per Parke, B., at p. 363; 20 L. J., Ex. 212; *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 697; 45 L. J., Ch. 638; 38 L. T. 513.

⁵ 6 Ex. 353.

the defendant diverted water from a river for the purposes of irrigation, and the amount of water was not thereby diminished, but the water arrived so late at the plaintiff's land below that he could not use it fully for irrigation purposes, it was held that this detention of the water by the defendant was a use of it which was in its character necessarily injurious to the natural rights of the plaintiff as a riparian owner, and therefore a ground of action.¹

Mills.

The owner of a mill on the banks of a running stream may, as has been stated, divert and use the water for the purposes of his mill, provided he does not thereby interfere with the rights of other riparian owners above or below him. He cannot, however, unless he has gained a prescriptive right to do so, interfere, by his user of the water, with the rights of other riparian owners.²

"The owner on the banks of a non-navigable river," says Lord Blackburn,³ "has an interest in having the water above him flow down to him, and in having the water below him flow away from him as it has been wont to do, yet I apprehend that a proprietor may, without any illegality, build a mill-dam across the stream within his own property, and divert the water into a mill lade without asking leave of the proprietors above him; provided he builds it at a place so much below the lands of those proprietors as not to obstruct the water from flowing away as freely as it was wont, and without asking leave of the proprietors below him, if he takes care to restore the water to its natural course before it enters their land."⁴

So where a riparian owner has so appropriated in a reasonable manner the water of a stream to a beneficial use, he may at once maintain an action for any infringement of this new use by other riparian owners, above or below him. He cannot, however, unless he has gained a prescriptive right so to do, interfere by his user of the water with the rights of other riparian owners.

The occupier of a mill may maintain an action for infringing his water-right, though he has not enjoyed it for twenty years in precisely the same state; and it is no defence that the occupier

¹ *Sampson v. Hoddinot*, 1 C. B., N. S. 590. See per Cairns, L. C. in *Swinden Water Co. v. Wilts and Berks Canal*, ante, p. 122.

² See per Martin, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 1. See post, Chap. IV.; as to the rights of seigneurs in

Lower Canada, see *St. Louis v. St. Louis*, 3 Moo., P. C. 398.

³ *Orr Ewing v. Colquhoun*, 2 App. Cas. 856; cf. *Miner v. Gilmour*, 12 Moore, P. C. C. 131.

⁴ As to Weirs and Dams under the Fishery Laws, see post, Chap. VI.

had within a few years erected on his mill a wheel of different dimensions, but requiring less water. Bayley, J., said: "The plaintiff proved that he was possessed of a mill, that the water had flowed from time immemorial in a particular channel, and that the defendant had obstructed it. If a person stop a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action."¹

In an action for diverting a stream, it was alleged that defendant placed a dam across the stream, and thereby diverted the water from its usual course. Held, that such allegation was supported by proof that in consequence of the dam the water was prevented from being regularly supplied to the mill, though the stream was not diverted, and returned to its course before it reached the mill, and there was no waste of water.² But a count for diverting and turning a stream is not supported by proof of penning back and checking it, whereby water was made to overflow plaintiff's land.³

Plea of diversion, how supported.

A riparian owner on a natural stream, who has, without infringing the rights of the other riparian owners, diverted for the purposes of his mill a portion of the water by means of an artificial conduit or goit, does not from the fact that the goit is artificial lose his natural rights with regard to the water so supplied, but may maintain an action for diversion or pollution of the stream, whereby his rights with regard to the water in the goit are infringed. Where the conduit or goit is on the land of the mill-owner himself, there seems to be no doubt that the law is as above stated;⁴ but where the artificial channel has been constructed by license across the land of another, some difference of opinion has arisen as to whether a riparian owner has sufficient interest in such artificial channel to enable him to maintain an action for an interference with the water therein by a higher riparian owner on the natural stream. This question seems to depend on whether the diversion amounts to the division of the stream into two channels, so as to make the lower owner a riparian owner on the new channel.

Diversion of natural stream by artificial means.

¹ *Saunders v. Newman*, 1 B. & Ald. 258; 19 R. R. 312; *Cox v. Mathews*, 1 Ventr. 137.

² *Shears v. Wood*, 7 Moore, 345. See *Sampson v. Hoddinot*, 1 C. B., N. S. 690.

³ *Griffiths v. Mann*, 6 Price, 1.

⁴ See per Lord Campbell, C. J., in *Beeston v. Wente*, 5 E. & B. 986; and per Kelly, C. B., in *Holker v. Porritt*, L. R., 8 Ex. 114.

It has been decided in the case of *The Stockport Water Co. v. Potter*,¹ by the majority of the Court of Exchequer—Bramwell, B., *dissentiente*—that if a riparian owner grants to a non-riparian owner lands not abutting on the stream, this grant, though valid as against the grantor, can create no right for an interruption of which the grantee can sue a third party; and that, therefore, the Stockport Water Company, who had bought from a riparian owner certain waterworks not on riparian lands, and also the use of certain tunnels and conduits running through the riparian lands from a natural stream to the waterworks, could not sue a higher riparian owner for polluting the stream.² Bramwell, B., dissented from this view of the law, and held that the grantees could recover, on the general principle that where a man has property he may grant to others estates in and enjoyment of it.

*Nuttall v.
Bracewell.*

In *Nuttall v. Bracewell*,³ the plaintiff owned a mill situate on riparian lands, which was supplied with water by an open goit, made in 1804 by agreement in writing with the adjoining higher riparian owner, Mr. Bagshaw, diverting water from the stream on which the mill was situate, by means of a weir at a point called Tom Milner's Ing on that upper owner's land. The water was again returned to the stream below the mill. The action was brought by the plaintiff against a higher riparian owner for diverting water from the stream above the weir. A verdict was given for the plaintiff; but a rule was obtained for a new trial, on the ground that the plaintiff was a mere licensee, and not a riparian owner, and could not, therefore, on the authority of *Stockport Waterworks v. Potter*, recover for the diversion. The Court gave judgment for the plaintiff, and discharged the rule.

Martin, B., says: "The application and use of flowing water "to work machinery is as old as the law. Corn mills have "existed from time immemorial, and it appears from old legal "authorities that fulling and other mills worked by water for "the purpose of manufacture are of a very ancient date. Until "the last century, steam as a power was, if known, not much in "use; and until it was introduced, water power was very generally

¹ 3 H. & C. 300. See *Whalley v. Laing*, 3 H. & N. 675, 901; 27 L. J., Ex. 422.

² The water in this case was diverted for the purpose of supplying the town of Stockport with water, which was an unreasonable use for a riparian owner to

make of it. See *Swindon Waterworks v. Wilts and Berks Canal*, L. R., 7 H. L. 697.

³ L. R., 2 Ex. 1; 36 L. J., Ex. 1; 15 L. T. 313.

“used; and it is still the cheapest one available. The mill is sometimes situated upon the bank of the natural stream, but more usually at some little distance from it; the water is conveyed to it by a goit or artificial cut, leading from the stream, and then, after turning the wheel of the mill, flows away in what is commonly called the tail goit. So also, water was and is very frequently conveyed from the natural stream in the same manner, for purposes of irrigation. And it is not too much to say, that the value of actual or supposed water rights of this character throughout England may be estimated by hundreds of thousands, if not millions.” His Lordship then cites Lord Kingsdown’s exposition of the law relating to riparian rights, in *Miner v. Gilmour*,¹ and continues: “According to the law so enunciated, and which no doubt is the law, it would be competent for Mr. Bagshaw, or his successor in the ownership of Tom Milner’s Ing, to erect a mill upon it, and take the water from the stream to work it, provided he neither penned back the water upon his neighbour above, nor injuriously affected the volume and flow of the water of the stream to his neighbour below. And the law favours the exercise of such a right; it is at once beneficial to the owner and to the commonwealth. And if this be so, why may not the owners of two adjoining closes agree together for their mutual benefit to take water through a goit from the close of the one into the close of the other, returning the water to the stream in the close of the latter, and thereby doing no injury to any one? In point of fact, very many goits pass through the land of different landowners, between the place where the water is taken from the stream and the mill where it works the machinery.” The learned Baron went on to say, that as the right to the flow of water in a goit was a well-known easement,² he was of opinion that although such an easement could be only binding as against the grantor if by deed, that the actual possession of the goit by the plaintiff gave him a right of action against defendant, a wrongdoer.

Pollock, C. B., and Channell, B., arrived at the same conclusion, but upon different grounds, holding that the diversion of the stream by means of the goit was lawful, and amounted to

¹ 12 Moo. P. C. 156. See *ante*, pp. 121, 122.

² As to this see *post*, Chap. IV.; and per Cockburn, C. J., in *Mason v. Shrewsbury*,

L. R., 6 Q. B. 586; and per Lord Campbell, C. J., in *Beeston v. Weate*, 5 E. & B. 986; 25 L. J., Q. B. 115.

a division of the stream into two channels; and that the plaintiff, as a riparian owner on the goit, had all the rights which a riparian owner would have had on a natural stream. "The *Stockport case*," says Channell, B., delivering the joint judgment of the Lord Chief Baron and himself, "in effect decided that a riparian proprietor cannot grant away his water rights apart from his estate, so as to place the grantee in the same position with respect to the other riparian proprietors as he occupied himself. . . . If, however, two adjoining riparian proprietors agree to divert the stream so that it shall run in two channels instead of one, the water passing again into the old stream below their land, and flowing down to the lower proprietors as before, the case is, I think, different. What is done is apparent to all, and any use that may be made of the new stream, as to turn a mill for instance, is as apparent as if the mill were upon the old stream. What is done by the two proprietors may be supposed to be a more convenient way of using the flow of the water, while it in no way diminishes or affects the rights of the other proprietors." This distinction is alluded to in the judgment of the majority in *Stockport Waterworks v. Potter*,¹ where it is said: "The case where a riparian proprietor makes two streams instead of one, and grants land on the new stream, seems analogous to a grant of a portion of the river bank, but not analogous to a grant of a portion of the riparian estate not abutting on the river. In the case of a grant of land on a new stream, the grantee obtains a right of access to the river, and it is by virtue of that right of access that he obtains his water rights."

Bramwell, B., also gave judgment for the plaintiffs on the same ground as in the *Stockport case*.

*Crossley v.
Lightowler.*

In *Crossley v. Lightowler* the plaintiffs, owners of mills on the river Hebble, by agreement with a higher riparian owner named Pilling, laid down a pipe in that higher riparian owner's land, for the purpose of obtaining a supply of pure water from the river above Pilling's dye works. A suit was brought to restrain the defendant, a higher riparian owner, from polluting the river to the plaintiff's injury, and an injunction granted by Wood, V.-C.,² but on appeal so much of the decree as related to fouling of the water received through the pipe on Pilling's land was reversed by Lord Chelmsford, L. C.³ "From what has

¹ 3 H. & C. 300.

² L. R., 3 Eq. 279.

³ L. R., 3 Ch. 478.

“been already said,” says the learned Lord, “it may be collected that, in my opinion, if the plaintiffs had proved the pollution of the Hebble opposite to their mills by the defendants, they would have had good ground for an injunction, although they were not actually using the water for their business. But, although the plaintiffs by their bill assert their rights as riparian proprietors, the case which they prove is of an entirely different description. Whether the agreement with Messrs. Pilling, however binding upon them, would enable the plaintiffs to assert the right acquired under it in their own names against any person fouling the waters thus artificially obtained is, perhaps, doubtful: but the plaintiffs do not claim as the grantees of Pilling, but in their character as riparian proprietors, and the fouling which they prove is not of the water which flows between the banks at Dean Clough (*i.e.*, past plaintiffs’ mill), but of the supply, which they draw to the mills from a higher source. This is clearly not an injury to the rights of the plaintiffs as riparian owners.”¹

In the recent case of *Ormerod and another v. The Todmorden Joint Stock Mill Company, Limited*,² in which it was held by the Court of Appeal that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful, if it sensibly affects the flow of the water by the lands of other riparian proprietors, the foregoing cases were fully discussed, and the judgment of Brett, M. R., in the Court of Appeal is instructive as to riparian rights in artificial channels.

*Ormerod v.
Todmorden
Co.*

In this case the plaintiffs, who were riparian owners on the Burnley river, from which they for many years had conducted water to their mill, complained that their rights were injuriously affected by the defendants, who were *not* riparian owners, but conducted water by means of a pipe laid through the land of a riparian owner about fifty yards above the plaintiffs’ intake to their works, where some of it was used or lost, and the remainder returned to the river in a heated condition, thus sensibly diminishing its quantity and deteriorating its quality when it arrived at the plaintiffs’ land.

¹ See also *Holker v. Porrit*, L. R., 3 Ex. 107; 44 L. J., Ex. 52; 33 L. T. 125; *Beeston v. Weate*, per Lord Campbell, C. J., 5 E. & B. 986; *Magor v. Chadwick*,

11 A. & E. 571; 9 L. J., Q. B. 159; *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; *Wood v. Waud*, 3 Ex. 748.

² 11 Q. B. D. 155.

Cave, J., gave judgment for the plaintiffs with costs and an injunction restraining defendants, and judgment was affirmed by the Court of Appeal (Brett, M. R., and Lindley and Bowen, L. JJ.).

"The question whether the defendants are or are not riparian owners depends," says Brett, M. R., "on *Nuttall v. Bracewell*¹ and *Holker v. Porrit*,² rather than upon *Stockport Waterworks Co. v. Potter*.³ In those two cases the questions between the parties depended upon riparian ownership; at least this was the view of some of the judges who took part in the decisions. It was contended in *Nuttall v. Bracewell*¹ that a riparian owner could not confer his own rights upon another person; but Pollock, C. B., and Channell, B., held that by the construction of the goit the course of the river was altered, a new channel was created, and thenceforward the stream ran in two channels or branches; and these judges held that because the stream flowed in two branches, the owner of the land along which the new branch passed was a riparian owner. The case was decided on the ground that the new stream was a branch of the river. That was not a case where a mere easement had been created, where a mere pipe had been laid in the ground. In *Holker v. Porrit*² the judges of the Court of Exchequer appear to have acted upon somewhat similar reasonings, although in the Exchequer Chamber the judgment was affirmed on a different ground. Neither of these two cases fully defines what is a riparian owner: in the present case the question depends to some extent upon the facts of the case. . . . The defendants have taken nothing in the soil which abuts upon the river; they do not own a single inch of the bank, they are not riparian owners: then are they entitled to the rights of riparian owners? The answer depends upon whether the decision of the majority of the Court of Exchequer in *Stockport Waterworks Co. v. Potter*³ can be supported: we must take the ground of the decision to be that which is stated. The question there was whether the rights of a riparian proprietor can be assigned; and the following doctrine was laid down in the judgment:⁴ 'There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water

¹ L. R., 2 Ex. 1.

² 3 H. & C. 300.

³ L. R., 8 Ex. 107; L. R., 10 Ex. 59.

⁴ 3 H. & C., pp. 326, 327.

“ ‘rights, and at the same time transfer those rights, or any
“ ‘of them, and thus create a right in gross by assigning a
“ ‘portion of his rights appurtenant. It seems to us clear
“ ‘that the rights which a riparian proprietor has with respect
“ ‘to the water are entirely derived from his possession of land
“ ‘abutting on the river. If he grants away any portion of his
“ ‘land so abutting, then the grantee becomes a riparian pro-
“ ‘prietor, and has similar rights. But if he grants away a
“ ‘portion of his estate not abutting on the river, then clearly
“ ‘the grantee of the land would have no water rights by virtue
“ ‘merely of his occupation. Can he have them by express
“ ‘grant? It seems to us that the true answer to this is that
“ ‘he can have them against the grantor, but not so far as to
“ ‘sue other persons in his own name for an infringement of
“ ‘them.’ This passage contains the reason of the decision of
“ ‘the majority. The grantee has his rights as against the
“ ‘grantor, but not as against any one besides. Bramwell, B.,
“ ‘dissented; and no doubt we ought to carefully consider any
“ ‘objection coming from him. In *Nuttall v. Bracewell* it was
“ ‘held that the plaintiff was a riparian proprietor in respect of a
“ ‘goit; but Pollock, C. B., and Channell, B., did not alter the
“ ‘opinion which they had formed in *Stockport Waterworks Co.*
“ ‘*v. Potter*; they adhered to the ground of their judgment in
“ ‘that case. They pointed out that the rights of a riparian
“ ‘proprietor can be easily ascertained, but that one riparian
“ ‘proprietor may have no means of ascertaining who are the
“ ‘grantees of another riparian proprietor: they repeated that
“ ‘the grantee of a riparian proprietor can sue only the grantor
“ ‘for any interference with him. I am prepared to say that,
“ ‘for the reasons given by Pollock, C. B., and Channell, B.,
“ ‘I agree with the judgment of the majority of the Court in
“ ‘*Stockport Waterworks Co. v. Potter*; the grant of a right to
“ ‘flowing water by a riparian owner is valid only against him-
“ ‘self, and cannot confer rights as against others. The law as
“ ‘to flowing water is part of the common law of England;
“ ‘but it only exists as between riparian owners; it does not
“ ‘extend to those whose lands do not abut on streams and rivers.”

So far as these cases go the following principles seem clear, viz., that no person but a riparian owner can sue a riparian owner for injury to the flow of water in a stream; that where the stream is artificial no owner on it can be called a riparian owner

unless the artificial stream amounts to a branch or division of the natural stream; and that the mere grantee of a riparian owner has no right to sue any riparian owner at all except his own grantor, and is not entitled to use the water as a riparian owner if his use thereof sensibly affects the flow of the water by the lands of other riparian owners. A non-riparian owner, however, who under license from a riparian owner takes water from a stream and returns it unpolluted and undiminished is not liable to be restrained by injunction at the suit of a lower riparian owner.¹ It must, however, be kept in mind that it has been laid down by the highest authority that permanent artificial channels may be so enjoyed as to confer rights to the use of the water, especially in cases where from the antiquity of such channels there is a doubt as to whether they were not part of a natural stream.² Such rights are, however, not properly called natural rights, but are acquired by prescription, and as such are fully considered in another chapter.³

Rights as
against mere
trespassers or
wrong-doers.

The above cases have all been decided as between persons claiming rights on artificial watercourses and riparian owners on the natural streams from which the water in the artificial watercourses originally came, and would not, it is submitted, though the language of some of the judgments is very comprehensive, affect the right which a person enjoying the benefit of water in an artificial channel which he has legally appropriated would have to sue a mere trespasser or wrongdoer for a direct interference with his enjoyment. "No one," says Brett, M. R.,⁴ "is justified in injuring the right of appropriation which everybody else has." "Mere possession of rights corporeal and incorporeal is sufficient to maintain an action against a wrongdoer."⁵ The only case which seems to be directly against this contention is that of *Whaley v. Laing*, where the Court of Exchequer Chamber held, reversing the Court of Exchequer, that the licensee of a canal company who took water from the canal for his engines could not sue the defendant, who polluted the water of the canal, which passed to and injured the boilers of

¹ *Kensit v. G. E. Rail. Co.*, 27 Ch. D. 122; 54 L. J., Ch. 19; 51 L. T. 862.

² *Rameshwar Pershad Singh v. Koonj Behari Pattuck*, 4 App. Cas. 121; *Wood v. Waud*, 3 Ex. 748; 18 L. J., Ex. 305; *Roberts v. Richards*, 51 L. J., Ch. 944 (C. A.); 50 L. J., Ch. 297; 44 L. T. 271; *Blackburn v. Somers*, 5 L. R., Ir. 1; *Baily v. Clark*, (1901) 17 T. L. R.

239; (1902) 18 T. L. R. 364.

³ *Post*, Chap. IV., pp. 204 *et seq.*

⁴ *Ballard v. Tomlinson*, 29 Ch. D. 115, at p. 122. See *post*, p. 201.

⁵ *Pullan v. Roughton Bleaching Co.*, 21 L. R., Ir. 73; see *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Nuttall v. Braccwell*, L. R., 2 Ex. 1.

the plaintiff. The question was, whether the plaintiff, as he had no legal right to the water, but merely a license to use it, could sue the defendant for the damage. The declaration stated that the plaintiff used and had enjoyed the benefit of the water, which water had been used, and then ought to have run and flowed without pollution. The Court of Exchequer¹ held, without deciding whether the plaintiff had any possessory title in the water of the canal—so that if the defendant had stopped the flow of it to the plaintiff, or if the plaintiff, in order to get the water, had to go to the canal and draw it with a bucket, any action could have been maintained—that he was entitled to judgment on the ground that the defendant caused foul water to flow on to the plaintiff's premises without justification. They held, further, that the declaration did not mean an assertion of title in the plaintiff, but that the defendant had no right to foul the water. On appeal the Court of Exchequer Chamber² were divided in opinion: Willes and Crowder, JJ., held that the judgment of the Court below ought to be affirmed, on the ground that the plaintiff was in possession of the water, and the defendant was a wrongdoer. Crompton and Erle, JJ., held that the declaration was bad, as it claimed indirectly a right to the flow of the water which was not supported by evidence of any legal right; but they added that they did not say that an action might not lie if a man had permission from the owner of a pond to get water for his cattle, and if a stranger, knowing the probable and natural effect of his act, poisoned the water so that the cattle were injured, that probably in such a case an action would lie; but that the right of action would be founded, not on the title or right to the water, but on the injury to the property of the plaintiff. Williams, J., held the declaration bad in substance, and that the judgment should be arrested; but that the plaintiff was entitled to the verdict. Wightman, J., thought the defendants were entitled to judgment, as the plaintiff had no legal right to the water, and that, as against him, the defendants could not be considered wrongdoers. The result was that the verdict for the plaintiff was directed to stand, but judgment was arrested.

In the case of *Stockport v. Potter*,³ Bramwell, B., who dissented from the judgment of the Court, holding that grantees could

¹ 2 H. & N. 476.

² 3 H. & N. 675.

³ 3 H. & C. 300; see *Nuttall v. Bruce-well*, L. R., 2 Ex. 1.

recover, on the general principle that where a man has property, he may grant to others rights in it, for which the grantees can sue, says: "In this case, however, the plaintiffs cannot rely on their mere possession of the water they take, or perhaps, I ought to say, on their mere taking of it. For whatever *Whaley v. Laing* may have decided, it certainly decided this, that such possession was not enough to enable the possessor to maintain an action. For that case decides that the plaintiff had not alleged, or having alleged had not proved, a right to the water, and so could not recover."

The case of *Whaley v. Laing*¹ was therefore decided by a bare majority of the judges, and was clearly against the opinion of the late Lord Bramwell.² It was, moreover, a claim by a mere licensee, whose interest in the water was possibly less than that of a grantee, who could sue his grantor for interfering with the subject of his grant. It seems also against the principles stated in *Ballard v. Tomlinson*³ and *Womersley v. Church*,⁴ viz., that the right to sue a wrongdoer for a direct injury done to water which has been appropriated does not depend on property in that water.⁵

Liability to
receive flood
water.

A riparian owner is not only entitled to have the waters of a stream passing through his lands flow to him in its natural state so far as it is a benefit to him, but he is also bound to submit to receive it so far as it is a nuisance to him by its tendency to flood his lands.⁶ Unless, therefore, the flow of the stream is increased or diverted to his prejudice by some unauthorized act, either of proprietors above or below him, he has no remedy, but must submit to what is the result of natural causes.

Thus where a stream becomes by natural causes silted up or choked with reeds, and in consequence overflows adjoining land, there is no common law liability on the owner to clear the channel or to compensate the adjoining landowners who may be damaged thereby.⁷

Liability for
escape and
overflow of
water.

The principles of law regulating the duties and liabilities of

¹ 3 H. & N. 675.

² The opinion of Bramwell, B., in *Stockport v. Potter*, that a grantee can sue another riparian owner, is overruled in *Ormerod v. Todmorden Co.*, 11 Q. B. D. 155, ante, p. 131.

³ 29 Ch. D. 115; 54 L. J., Ch. 404; 52 L. T. 492; post, p. 201.

⁴ 17 L. T., N. S. 190.

⁵ See *Rockdale Canal v. King*, 14

Q. B. 122, 136, post, p. 302; *Cockburn v. Erewash Canal*, 11 W. R. 34; *Shand v. Henderson*, 2 Dow, H. L. C. 519; 14 R. R. 202.

⁶ Per Blackburn, J., in *Mason v. Shrewsbury Rail. Co.*, L. R., 6 Q. B. 582. See also *Wilson v. Waddell*, 2 App. Cas. 95; 35 L. T. 639.

⁷ *Hudgson v. Mayor of York*, 28 L. T., N. S. 836. See also *Cracknell v.*

the owners of land with regard to the escape and overflow of water, and the rights they have of protecting their land from such overflow, have been discussed of late in a series of important cases, and seem now to be settled on a satisfactory basis. The general principle regulating the liabilities of landowners, with regard to the escape and overflow of water, seems to be as follows: Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use,¹ though mischief thereby accrues to his neighbour, he will not be liable for damages; but where for his own convenience he diverts or interferes with the course of a stream, or where he brings upon his land water which would not naturally have come upon it, even though in so doing he act without wilfulness or negligence, he will be liable for all direct and proximate damages,² unless he can show that the escape of the water was caused by an agent beyond his control, or by a storm, which amounts to *vis major* or the act of God, in the sense that it is practically, if not physically, impossible to resist it.³ His liability, moreover, in no way depends on his knowledge of the existence of the nuisance.⁴

Negligence is defined by Alderson, B.,⁵ as follows: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do." "It is now thoroughly established," says Lord Blackburn,⁶ "that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that

Negligence defined.

Thetford, L. R., 4 C. P. 629; *Parrett Navigation Co. v. Robins*, 10 M. & W. 593; *Bridge's case*, 10 Rep. 33.

¹ With regard to natural streams, it is the undoubted right of the owner of the banks and bed to build on the bed or banks in the same way as he may on any part of his land not covered with water; provided that he does not interfere with either the rights of navigation or of the other riparian owners above or below him; he cannot, however, obstruct the course of a stream by building on the ordinary or flood channel, so as to throw the waters in the times of ordinary flood on the grounds of another proprietor to his injury: *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Menzies v. Broadalbane*, 3 Bli., N. S. 414; 32 R. R.

103. See *ante*, Chap. II., pp. 82, *et seq.*

² *Cattle v. Stockton Water Co.*, L. R., 10 Q. B. 453; 44 L. J., Q. B. 139; 33 L. T. 475.

³ *Rylands v. Fletcher*, L. R., 3 H. L. 330; L. R., 1 Ex. 265; *Fletcher v. Smith*, 2 App. C. 781; *Box v. Jubb*, 4 Ex. D. 76; *Nicholls v. Marsland*, L. R., 10 Ex. 255; L. R., 2 Ex. D. 1; 35 L. T. 725; *Boughton v. Mid. and G. W. Rail. Co.*, Ir. R., 7 C. L. 169.

⁴ See *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 250.

⁵ *Blyth v. Birmingham Water Co.*, 11 Ex. 734.

⁶ *Geddis v. Bann Reservoir Co.*, 3 App. Cas. 430.

“ which the legislature has authorized, if it be done negligently. “ I think that if by a reasonable exercise of the powers, either given “ by statute to the promoters, or which they have at Common Law, “ the damage could be prevented, it is, within this rule, ‘ negli- “ gence ’ not to make such reasonable exercise of their powers.”

“ The ideas of negligence and duty,” says Lord Justice Bowen, in *Thomas v. Quatermaine*,¹ “ are strictly correlative, and there “ is no such thing as negligence in the abstract; negligence is “ simply neglect of some care which we are bound by law to “ exercise towards somebody.” Ignorance of the existence of a cause of mischief has, moreover, been held to be no excuse, where the ignorance is the result of culpable negligence.²

Liability
the same as
to surface and
underground
water.

*Rylands v.
Fletcher.*

The principles of law above stated have been held to apply equally to water upon the surface and underground, and in fact most of the important decisions have arisen with regard to the effects of mining operations. A series of cases has of late fully settled the law on this most important subject, of which *Rylands v. Fletcher*³ is the first. The facts of the case and the principles of law are thus stated by Lord Cairns, L. C. : “ The “ plaintiff is the occupier of a mine and works under a close “ of land. The defendants are the owners of a mill in his “ neighbourhood, and they proposed to make a reservoir for the “ purposes of keeping and storing water to be used about their “ mill upon another close of land, which for the purposes of this “ case may be taken as being adjoining to the close of the “ plaintiff, although in point of fact some intervening land lay “ between the two. Underneath the close of land of the defen- “ dants, on which they proposed to construct their reservoir, “ there were certain old and disused mining passages and works. “ There were five vertical shafts, and some horizontal shafts “ communicating with them. The vertical shafts had been filled “ up with soil and rubbish, and it does not appear that any “ person was aware of the existence of either of the vertical “ shafts or of the horizontal works communicating with them. “ In the course of the working by the plaintiff of his mine, he “ had gradually worked through the seams of coal underneath “ the close, and had come into contact with the old and disused “ works underneath the close of the defendants. In that state

¹ 18 Q. B. D. 685, 694.

³ L. R., 3 H. L. 330; 37 L. J., Ex. 161;

² *Mersey Docks v. Gibbs*, L. R., 1 19 L. T. 220.
H. L. 93.

“ of things, the reservoir of the defendants was constructed. It
“ was constructed by them through the agency and inspection of
“ an engineer and contractor. Personally, the defendants appear
“ to have taken no part in the works, or to have been aware of
“ any want of security connected with them. As regards the
“ engineer and the contractor, we must take it from the case that
“ they did not exercise, as far as they were concerned, that
“ reasonable care and precaution which they might have exercised,
“ taking notice, as they appear to have taken notice, of the
“ vertical shafts filled up in the manner which I have mentioned.
“ However, my Lords, when the reservoir was constructed and
“ filled, or partly filled with water, the weight of the water bear-
“ ing upon the disused and imperfectly filled up vertical shafts,
“ broke through those shafts. The water passed down them and
“ into the horizontal workings, and from the horizontal workings
“ under the close of the defendants it passed on into the workings
“ under the close of the plaintiff and flooded his mine, causing
“ considerable damage, for which this action was brought. The
“ Court of Exchequer, when the special case stating the facts to
“ which I have referred was argued, was of opinion that the
“ plaintiff had established no cause of action. The Court of
“ Exchequer Chamber, before which an appeal from this judg-
“ ment was argued, was of a contrary opinion; and the judges
“ there unanimously arrived at the conclusion that there was a
“ cause of action, and that the plaintiff was entitled to damages.
“ My Lords, the principles on which the case must be determined
“ appear to me to be extremely simple. The defendants, treating
“ them as the owners or occupiers of the close on which the
“ reservoir was constructed, might lawfully have used that close
“ for any purpose for which it might, in the ordinary course of
“ the enjoyment of land, be used; and if, in what I may term
“ the natural user of that land, there had been any accumulation
“ of water, either on the surface or underground, and if, by the
“ operation of the laws of nature, that accumulation of water had
“ passed off into the close occupied by the plaintiff, the plaintiff
“ could not have complained that that result had taken place.
“ If he had desired to guard himself against it, it would have
“ lain upon him to have done so, by leaving, or by interposing,
“ some barrier between his close and the close of the defendants,
“ in order to have prevented that operation of the laws of nature.
“ As an illustration of that principle, I may refer to a case

“which was cited in the argument before your Lordships, the
 “case of *Smith v. Kenrick*,¹ in the Court of Common Pleas. On
 “the other hand, if the defendants, not stopping at the natural
 “use of the close, had desired to use it for any purpose, which I
 “may term a non-natural use, for the purpose of introducing into
 “the close that which in its natural condition was not in or upon
 “it, for the purposes of introducing water, either above or below
 “ground, in quantities and in a manner not the result of any
 “work or operation on or under the land; and if, in consequence
 “of their doing so, or in consequence of any imperfection in the
 “mode of their doing so, the water came to escape and to pass
 “off into the close of the plaintiff, then it appears to me that
 “that which the defendants were doing they were doing at their
 “own peril; and if, in the course of their doing it, the evil arose
 “to which I have referred, the evil, namely, of the escape of the
 “water and its passing away to the close of the plaintiff and
 “injuring the plaintiff, then for the consequence of that, in my
 “opinion, the defendants would be liable. As the case of *Smith*
 “*v. Kenrick* is an illustration of the first principle to which I
 “have referred, so also the second principle to which I have
 “referred is well illustrated by another case in the same Court
 “—the case of *Baird v. Williamson*,² which was also cited in the
 “argument at the bar. My Lords, these simple principles, if
 “they are well founded, as it appears to me they are, really
 “dispose of this case. The same result is arrived at on the
 “principles referred to by Mr. Justice Blackburn in his judgment
 “in the Court of Exchequer Chamber, where he states the
 “opinion of that Court as to the law in these words: ‘We
 “‘think that the true rule of law is, that the person who, for
 “‘his own purposes, brings on his land, and collects and keeps
 “‘there anything likely to do mischief if it escapes, must keep
 “‘it at his peril; and if he does not do so, is *prima facie* answer-
 “‘able for all the damage which is the natural consequence of
 “‘its escape.’³ He can excuse himself by showing that the
 “‘escape was owing to the plaintiff’s default; or, perhaps, that
 “‘the escape was the consequence of *vis major*, or the act of
 “‘God; but as nothing of this sort exists here, it is unnecessary
 “‘to inquire what excuse would be sufficient. The general rule,

¹ 7 C. B. 515; 18 L. J., C. P. 172.

² 15 C. B., N. S. 376.

³ As to this see *Jones v. Ffestiniog*

Itail, Co., L. R., 3 Q. B. 733; 37 L. J., Q. B. 214; 18 L. T. 902.

“as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour’s reservoir, or whose cellar is invaded by the filth from his neighbour’s privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour’s alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property (which was not naturally there), harmless to others, so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour’s, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. And upon authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stench.’ My Lords, in that opinion, I must say, I entirely concur. Therefore I move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed, and the present appeal be dismissed with costs.”

Following this decision, the Courts have held that, if any one, by artificially raising the surface of his own land, causes water, even though arising from natural rainfall, to pass to his neighbour’s land, and thus substantially to interfere with his enjoyment, he will be liable to an action at the suit of him who is injured. This liability is limited to liability for allowing things, in themselves offensive, to pass to a neighbour’s property, and for causing, by artificial means, things, in themselves inoffensive, to pass to a neighbour’s property, to the prejudice of his enjoyment thereof.¹

So, where water and sewage came on the defendant’s land by an artificial drain made for the convenience of the defendant, and, passing thence, flooded the plaintiff’s adjoining premises, it was held that the defendant was liable, although unaware of the existence of the drain, and consequently of its want of

Liability for bringing rain-water on the lands of another by means of artificial erection.

¹ See *Herdman v. N. E. Rail. Co.*, 3 C.P.D. 168 (C.A.); *Fitzsimmons v. Inglis*, 5 Taunt. 534. Cf. *Wilson v. Waddell*, 2 App. C. 95, *post*, p. 143, where the excavation of minerals was held to be

a natural use of the land. (Here, *semble*, raising the surface is not a natural use.) Cf. *Menzies v. Breadalbane*, 3 Bl., N. S. 414 (H. L.); 32 R. R. 103.

repair.¹ Following these decisions, it has been laid down by Wright, J., in a late case,² that where damage results to an occupier of land from water or other injurious matter collected on adjoining land, no action lies if the occupier of the land upon which the injurious matter is collected can show that the damage resulted—(1) from the neglect or default of some third party, or (2) without wilfulness or negligence on his part whilst using his land in an ordinary and reasonable manner, or (3) without negligence on his part, the injured party consenting to what was done, or (4) from water or other injurious matter, which was stored for the common benefit of both parties.

In the above case, the rain-water from the plaintiff's and defendant's adjoining roofs drained on to the roof of the defendant's area, and so down a pipe into the defendant's drain, this arrangement being with the assent and for the benefit of both parties, and it was held that the defendant was not liable, in the absence of negligence on his part, for damage arising to the plaintiff's premises from an accumulation of water on the area roof owing to an obstruction in the pipe. It has also been held that the occupier of a house is liable for the continuance of such a nuisance as the penetration of damp from an artificial mound on which his stable stood, though it had been put there before he took possession.³ In *Snow v. Whitehead*,⁴ the defendants had fitted their house with pipes which did not communicate with any drain. The water flowing down their pipes settled in their cellar, and thence percolated into the plaintiff's cellar, and did some injury. The Court held that the defendants had, by allowing the water to escape from their cellar, committed an actionable wrong. But where fair water flowed into a neighbour's premises without default of the defendant, but owing to a defect in the pipes which supplied him with water from waterworks, and caused damage, the defendant was held not liable, in the absence of negligence, such mode of supply being the ordinary way of using a man's property.⁵ Where persons occupy two floors of the same house, the upper occupier is not responsible

¹ *Humphries v. Cousins*, 2 C. P. D. 239; *Rylands v. Fletcher*, L. R., 3 H. L. 330.

² *Gill v. Edouin*, (1895) 15 R. 109; see also *Anderson v. Oppenheimer*, 5 Q. B. D. 602.

³ *Broder v. Saillard*, 2 Ch. Div. 692, M. R.; see also *Hodgkinson v. Ennor*, 4 B. & S. 229; *Bell v. Twentymen*, 1 Q. B.

766; *Tenant v. Goldwin*, 2 Lord Raymond, 1089.

⁴ 27 Ch. D. 588; 51 L. T. 253; 33 L. J., Ch. 885; see *Ballard v. Tomlinson*, 29 Ch. D. 115, *post*, p. 201.

⁵ *Sutton and Ash v. Card*, W. N. (1886) 120; see also *Blake v. Land and House Corporation*, 3 T. L. R. 667 (1887).

to the lower, in the absence of negligence, for an escape of water from his water-closet, whereby the lower occupier is injured.¹

So the discharging of rain-water from the roof of a house, either by means of a spout, or by drip, on the premises of a neighbour, is a nuisance, and actionable, in the absence of a prescriptive right to such discharge.²

In the case of *Cattle v. Stockton Waterworks*,³ it was decided that the liability for the escape of water only extends to the proximate and direct consequences of the escape, and that where a landowner had employed a contractor to excavate a tunnel on his land, and the works were stopped by the overflow of water from the defendant's pipes, even assuming that the landowner could recover, which point the Court did not decide, the contractor had no right of action for any loss which he might have sustained through being delayed in, or prevented from, completing his contract. In *Sharp v. Powell*,⁴ the defendant washed his van in a street, and the water flowed down into another street and froze, and it was held that though the washing of the van was an offence under the Metropolitan Police Act, 2 & 3 Vict. c. 47, damage caused to the plaintiff, whose horse slipped on the ice and was injured, was too remote.

In *Wilson v. Waddell*,⁵ the pursuer and defender were lessees of coal mines under one landlord. The seam of coal lay at a high inclination, and cropped out at the surface in defender's holding. The seam of coal entered the pursuer's holding at many fathoms below the surface, so that any water which fell on and percolated into the defender's holding would necessarily, by force and gravitation, descend to the pursuer's holding, unless stopped by the minerals or soil from doing so. The surface soil above the coal was an impervious clay, so that, while it was undisturbed, it held the water, and very little filtered down into the seam. Under these circumstances, the House of Lords held that, as the right to work mines is a right of property, which, if duly exercised, begets no responsibility, the defender having

Drip.

Liability only extends to proximate and direct consequences.

Right to work mines if duly exercised begets no responsibility.

¹ *Ross v. Fedden*, L. R., 7 Q. B. 661; 41 L. J., Q. B. 270; 26 L. T. 966; *Curstairs v. Taylor*, L. R., 6 Ex. 217; 40 L. J. Ex. 129. As to liability for negligence of servants for escape of water from lavatories, see *Stevens v. Woodward*, 6 Q. B. D. 318; 50 L. J., Q. B. 231; 44 L. T. 153; and *Ruddiman v. Smith*, 60 L. T. 708.

² *Tucker v. Newman*, 11 A. & E. 40; *Fay v. Prentice*, 14 L. J., C. P. 298;

Rolfe v. Rolfe, cited in *Benwick v. Combdon*, Moo. 353; 5 Rep. 101.

³ L. R., 10 Q. B. 453; 44 L. J., Q. B. 139; 33 L. T. 475; see *Lumley v. Gye*, 2 E. & B. 252; 22 L. J., Q. B. 479; *Lung-ridge v. Levy*, 2 M. & W. 519; 46 R. R. 689; 4 M. & W. 337.

⁴ L. R., 7 C. P. 253; 41 L. J., C. P. 45; 26 L. T. 437.

⁵ 2 App. Cas. 95; 35 L. T. 639.

worked out all his coal, and so caused a subsidence of the surface and a flow of rainfall into the pursuer's lower coal field, was not liable for any damage thereby caused, the injuries being entirely owing to gravitation and percolation.

In *West Cumberland Iron Co. v. Kenyon*, the defendants, owners of mining property, sunk a shaft, by which they tapped water which had formerly found its way into certain old workings on their own ground, and had thence percolated into plaintiffs' mines. The defendants then made a borehole at the bottom of the shaft. It was admitted that the making of it was not in the due course of mining, but only for the purpose of getting rid of the water. The effect of the borehole was to let off the water into the above-mentioned old workings on defendants' ground, whence it percolated into plaintiffs' works in the same way in which it would have done if neither the shaft nor borehole had ever been made. The Court of Appeal¹ held, reversing the decision of Fry, J.,² that the defendants had not, by making the shaft, so appropriated the water as to lay themselves under an obligation to keep it from coming to plaintiffs' land; and that, as the effect of defendants' operations was not to throw upon plaintiffs' land any burden which it had not borne before, the plaintiffs' case failed. So in *Smith v. Kenrick*, where the owner of a coal mine on a higher level worked out the whole of his coal in the ordinary way, leaving no barrier between his mine and the mine on the lower level, so that the water percolating into the upper mine flowed into the lower mine and obstructed the owner in getting his coal, it was held that the owner of the lower mine had no ground of complaint.³

Liability for throwing on a mine water which would not naturally have come there.

But where the owner of an upper mine did not merely suffer the water to flow through his mine, but pumped up quantities of water which passed into plaintiff's mine, in addition to that which would have naturally reached it, and so occasioned him damage, it was held that, though this was done without negligence, and in the due working of the defendant's mine, yet he was responsible for damage so occasioned.⁴ In the Scotch case of *Young v. Bankier Distillery Co.*,⁵ the respondents were riparian proprietors

¹ 11 Ch. D. 782; 46 L. J., Ch. 850.

² 6 Ch. D. 773.

³ 7 C. B. 564.

⁴ *Baird v. Williamson*, 15 C. B., N. S. 376; and see per Lord Cranworth in *Rylands v. Fletcher*, L. R., 3 H. L.

341; see *Hipkins v. Birmingham and Stafford Gas Co.*, 6 H. & N. 250; see also *Crompton v. Lea*, L. R., 19 Eq. 115; 44 L. J., Ch. 69; 31 L. T. 469.

⁵ (1893) A. C. 691; 69 L. T. 838; 58 J. P. 100, H. L. (Sc.).

on one side of a stream, and the appellants, without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would never have reached the stream. The respondents did not complain of the increased volume of the stream, but that the foreign water was of a character and quality different from that of the natural stream and that it prejudicially affected the water of the stream for distillery purposes: The House of Lords held, affirming the decision of the Court of Session,¹ that the respondents were entitled to have the appellants interdicted from discharging the mine water into the stream.

Lord Shand says (at p. 701): "I am, however, clearly of opinion that, while a lower proprietor must submit to the flow of water coming down upon his lands by the natural force of gravitation, he is not bound to receive water brought up from a depth by artificial means, such as pumping. The appellants would, no doubt, be entitled in mining to excavate and remove the strata of minerals in the lands leased to them to any depth practicable to which they might choose to go. If in doing so they should happen to tap springs or a water waste from which the water by gravitation rose to the surface and flowed down to a lower proprietor's land, this must be submitted to; but the mine owner is not entitled by pumping to increase this servitude or burden on one unwilling to submit to it by pumping up water which might never rise to the surface, or which might only do so more gradually and slowly and in much smaller volume. This is, I think, the rule or principle on which the Court decided the case of *Baird v. Williamson*², the decision in which has been approved of by your Lordships. I know of no distinction between the law of Scotland and the law of England in the class of questions relating to the common interests and rights of upper and lower proprietors on the banks of a running stream. The whole series of authorities in both countries seem to be entirely against the claim or pretension of the appellants for their own profit to pump up water from the depths of their pit and send it into the stream, greatly enlarging the quantity of water in the bed and impairing its quality."

In *Fletcher v. Smith*³ the defendants' mine was on a higher level than the plaintiffs' and on the surface of defendants' land

Liability for
escape of
water where
an artificial is

¹ 19 Cour. Sess. Cas., 4th series (Rettie), 1083.

² 2 App. Cas. 781; 47 L. J., Ex. 4; 37 L. T. 367.

³ 15 C. B., N. S. 376.

substituted
for a natural
channel.

Exceptional
rainfall.

were certain hollows or openings partly caused by, and partly made to facilitate, the defendants' workings. Across the surface of their land ran a watercourse which, in the year 1865, the defendants diverted into a new channel. In 1871 the banks of this watercourse, which were sufficient for all ordinary occasions, burst, owing to exceptionally heavy rains, and the water escaped into the hollows, and thence by cracks and fissures passed into plaintiff's mine. The defendants were not guilty of any actual negligence. On the trial of an action for damages, Lush, J., held that the case was governed by *Fletcher v. Rylands*,¹ and that the defendants were absolutely liable; he refused to receive evidence that the defendants had taken every reasonable precaution to guard against ordinary emergencies, and directed a verdict for the plaintiff. This ruling was upheld by the Court of Exchequer²; but the Court of Exchequer Chamber directed a new trial, on the ground that the case was not beyond all question governed by *Fletcher v. Rylands*, and that if evidence had been received there might have been questions for the jury.³ On the second trial, Pollock, B., left five questions to the jury:—
1st. Was the mine flooded from natural causes, or from anything done by the defendants? Answer: From the acts of defendants.
2nd (a). Was the flooding occasioned, in whole or in part, by the diversion of the stream? Answer: In part, and chiefly, by the diversion of the stream. 2nd (b). Or by the deficient condition of the new channel, and the banks thereof? Answer: And by the condition of the new channel. 2nd (c). Was the stream in its diverted course more likely to overflow in time of flood; and would its overflow do more damage to the plaintiff than if it had been allowed to flow in its former channel? Answer: The stream in its diverted course would be more likely to overflow, and so do more damage to the plaintiff. 3rd. Was the flooding occasioned by the failure of the diverted channel, or other means, to intercept the surface water on the broken ground? Answer: Yes.
4th. Was the flooding caused not by the insufficiency of the channel, but by the result of the exceptional rainfall? Answer: The rainfall was exceptional, but the new channel was insufficient. 5th. Was what was done by the defendants in the ordinary, reasonable, and proper working of their mine? Answer: Yes, if diversion of the stream had been properly executed. The verdict

¹ *Rylands v. Fletcher*, ante, p. 138.

² L. R., 7 Ex. 315.

³ L. R., 9 Ex. 64.

was entered for plaintiff, and a rule for a new trial discharged; and on appeal that decision was affirmed.

On appeal to the House of Lords this decision was again affirmed.¹ Their Lordships were of opinion that as the jury had found the new channel not to be so efficient as the old one, and, therefore, not sufficient to carry off rainfall, not exceptional, the defendants were responsible at all events. With regard to the duty imposed upon persons so altering a natural channel, Lord Penzance, in whose opinion the remainder of the House concurred, thus expresses himself: "In diverting it, what were 'these obligations? Was it enough to make the new and 'artificial watercourses as efficient, but no more so than the 'old and natural one, so that whatever defects, incapacity, or 'otherwise, the old one might have had, might, without respon- 'sibility, be produced in the new one? or, secondly, were they 'bound (as they, for their own convenience, were making a new 'and artificial watercourse) to construct it in such a manner 'that it would be capable of conveying off the water that might 'flow into it from all such floods and rainfalls as might reason- 'ably be anticipated to happen in that locality? or, thirdly, 'were they bound to make provisions for any such quantities 'of water as might possibly be discharged into it from any mere 'rainfall, however heavy, however unusual, and however con- 'trary to all previous experience? For my own part, I incline 'to think that the second proposition defines the true measure 'of the defendants' obligations, but I desire to express no positive 'opinion to that effect.'"²

In the case of *Nichols v. Marsland*,³ where the defendant formed artificial ornamental pools by damming up a natural stream, and an extraordinary rainfall burst the dams and injured the plaintiff's property, and the jury found that there was no negligence in the maintenance and construction of the pools, and that the flood was so great that it could not reasonably have been anticipated, though if it had been anticipated, the effect might have been prevented; it was held, affirming the judgment of the Court of Exchequer, that this was in substance a finding that the escape of water was caused by the act of God, or *vis major*, and that the defendant was not liable. Mellish, L. J.,

Extraor-
dinary rain-
fall; *vis major*
or the act of
God, how far
an excuse at
common law.

¹ 2 App. Cas. 781.

² See *A.-G. v. Tomline*, 40 L. T., N. S. 775, where this and the preceding cases

are discussed by Fry, J.

³ 2 Ex. Div. 1 (C. A.); L. R., 10 Ex. 255; 46 L. J., Ex. 174; 35 L. T. 725.

delivering the judgment of the Court, says: "It appears to us that we have two questions to consider:—First, the question of law which was left undecided in *Rylands v. Fletcher*,—Can the defendant excuse herself by showing that the escape of the water was owing to *vis major*, or, as it is termed in the law books, the 'act of God'? and, secondly, If she can, did she in fact make out that the escape was so occasioned? Now with respect to the first question, the ordinary rule of law is, that when the law creates a duty, and the party is disabled from performing it without any default of his own—by the act of God or the king's enemies—the law will excuse him; but when a party by his own contract creates a duty, he is bound to make it good, notwithstanding any accident by inevitable necessity.¹ We can see no good reason why that rule should not be applied to the case before us. The duty of keeping the water in and preventing its escape is a duty imposed by the law, and not one created by contract. If, indeed, the making a reservoir was a wrongful act in itself, it might be right to hold that a person could not escape from the consequences of his own wrongful act. But it seems to us absurd to hold that the making or the keeping a reservoir is a wrongful act in itself. The wrongful act is not the making or keeping the reservoir, but the allowing or causing the water to escape. If, indeed, the damages were occasioned by the act of the party without more—as where a man accumulates water on his own land, but owing to the peculiar nature or condition of the soil the water escapes and does damage to his neighbour—the case of *Rylands v. Fletcher* establishes that he must be held liable. The accumulation of water in a reservoir is not in itself wrongful; but the making it and suffering the water to escape, if damage ensue, constitute a wrong. But the present case is distinguishable from that of *Rylands v. Fletcher* in this,—that it is not the act of the defendant in keeping this reservoir—an act in itself lawful—which alone leads to the escape of the water, and so renders wrongful that which but for such escape would have been lawful,—it is the supervening *vis major* of the water caused

¹ See *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, where it was held that under the Pier and Harbour Act, 10 Vict. c. 27, where damage had been occasioned to a pier by a vessel through the violence of the wind and

waves, at a time when the master and crew had been compelled to leave the vessel, and had, consequently, no control over her, the owners were not liable. See *post*, Chap. VII.

“by the flood which, superadded to the water in the reservoir (which would of itself have been innocuous), causes the disaster. A defendant cannot, in our opinion, be properly said to have caused or allowed the water to escape, if the act of God or the queen’s enemies was the real cause of its escaping without any fault on the part of the defendant. If a reservoir was destroyed by an earthquake, or the queen’s enemies destroyed it in conducting some warlike operations, it would be contrary to all reason and justice to hold the owner of the reservoir liable for any damage which might be done by the escape of the water. We are of opinion, therefore, that the defendant was entitled to excuse himself by proving that the water escaped through the act of God. The remaining question is, did the defendant make out that the escape of water was owing to the act of God? Now the jury have distinctly found, not only that there was no negligence in the construction or the maintenance of the reservoirs, but that the flood was so great that it could not reasonably have been anticipated, although if it had been anticipated, the effect might have been prevented; and this seems to us in substance a finding that the escape of water was owing to the act of God. However great the flood had been, if it had not been greater than floods that had happened before, and might be expected to occur again, the defendant might not have made out that she was free from fault; but we think she ought not to be held liable because she did not prevent the effect of an extraordinary act of nature which she could not anticipate. In the late case of *Nugent v. Smith*,¹ we held that a carrier might be protected from liability for a loss occasioned by the act of God, if the loss by no reasonable precaution could be prevented, although it was not absolutely impossible to prevent it.² It was, indeed, ingeniously argued for the appellant that at any rate the escape of the water was not owing solely to the act of God; because the weight of the water originally in the reservoirs must have contributed to break down the dams as well as the extraordinary water brought in by the flood. We think, however, that the extra-

¹ 1 C. P. D. 423. James, L. J., there defines the act of God as “Any accident due to natural causes directly and exclusively without human intervention, such as could not have been prevented by any amount of foresight and pains and care reasonably to have been

“expected.”

² See per Bramwell, B., in this case in the Court of Exchequer, L. R., 10 Ex. 255, where he defines the act of God as “A state of circumstances practically, if not physically, impossible to prevent.”

"ordinary quantity of water brought in by the flood is, in point of law, the sole proximate cause of the escape of the water. "It is the last drop which makes the cup overflow."¹

In the case of *Nield v. London and North Western Railway* it was held, that where water causing damage was not brought there by the owner of an artificial watercourse, but was the result of circumstances over which he had no control—such as the sudden overflow of an adjoining stream—he was not liable for the damage.²

In *Harrison v. Great Northern Railway*,³ where the defendants were charged with repairing a drain, and the drain burst during a period of extraordinary rainfall, Pollock, C. B., delivering the judgment of the Court, says: "There was nothing in the weather of so extraordinary a character, that the defendants were not bound to anticipate it. The storm, though unusual and extraordinary in a sense—yet, as happening once in a year, or in a few years, was not unusual;" and the defendants were held responsible. But where pipes burst, owing to an unprecedented frost, such as no reasonable man could have provided against, a water company were held not liable for the damage caused.⁴ So where defendant, the landlord of a house, let the lower floor to plaintiff, and without any default in defendant, a rat ate a hole in a cistern, and plaintiff's goods were damaged by the water, he was held not liable; Kelly, C. B., being of opinion that the damage was caused by *vis major*.⁵ In *Box v. Jubb*,⁶ the owner of a reservoir was held not responsible for damage done by the overflow of his reservoir, caused by the emptying of a reservoir belonging to a third person, and by an obstruction in a drain not under his control.

Where liability is imposed by contract or Act of Parliament.

From the above cases there is no doubt that where a duty is cast on an individual by common law, he may excuse himself by showing that the performance of this duty was prevented by circumstances over which he had no control, amounting to *vis*

¹ See *Madras Rail. Co. v. Zemindar of Currentenagarum*, L. R., 1 Ind. App. 364, where it was held that, where it is the duty of the zemindar to maintain the tanks on his zemindary which are part of the national system of irrigation recognized by the laws of India, and the banks of the tank are washed away by an extraordinary flood without negligence on his part, the zemindar is not liable for damage caused by the escape of the water.

² L. R., 10 Ex. 4; 44 L. J., Ex. 15.

³ 33 L. J., Ex. 266; 10 L. T. 621; 10 Jur., N. S. 992; see also *Forward v. Pittard*, per Lord Mansfield, C. J.; 1 T. R. 33; Bell's Dict. & Dig. of Sc. Law, p. 11; Broom's Legal Maxims, 5th. ed., p. 530.

⁴ See *Blyth v. Birmingham Water Co.*, 11 Ex. 781; see *Withers v. North Kent Rail. Co.*, 27 L. J., Ex. 417.

⁵ *Carstairs v. T aylor*, L. R., 6 Ex. 217; see also *Boughton v. Mid. & G. W. Rail. Co.*, Ir. R., 7 C. L. 169.

⁶ 4 Ex. Div. 76; *Boughton v. Mid. & G. W. Rail. Co.*, Ir. R., 7 C. L. 168.

major, or the act of God. Where, however, he contracts that he will be liable at all events, or where a contract is made which does not expressly or impliedly except the act of God, the Courts cannot introduce that exception by intendment of law.¹ "If," says Cairns, L. C., in *The River Wear Commissioners v. Adamson*, "a duty is cast on an individual by common law, the act of God will excuse him from the performance of that duty. No man is compelled to do that which is impossible. If, however, a man contracts that he will be liable for the damage occasioned by a particular state of circumstances, or if an Act of Parliament declares that a man shall be liable for the damages occasioned by a particular state of circumstances, I know of no reason why a man should not be liable for the damage occasioned by that state of circumstances, whether the state of circumstances is brought about by the act of man, or by the act of God."²

In the case of *The Nitro-Phosphate Co. v. London Docks*,³ the defendants were required by Commissioners of Sewers and by Act of Parliament to keep the wall of their dock at a certain height. They failed to do this, and an extraordinarily high tide overflowed their wall and caused damage to the plaintiffs. The plaintiffs contended that defendants were bound at common law to keep their wall at a reasonable height. The defendants alleged that the wall was high enough to keep out all ordinary tides, and that the damage was caused by the act of God. They also contended that if they were liable for any damage at all, they could not be held responsible for the damage which was caused by the water which would have come over their wall if it had been at the prescribed height.

Fry, J., held that as the wall had been high enough to keep out all previous floods, and as the flood in question was of such an extraordinary character as to amount, in his opinion, to the act of God, he would have had great difficulty in coming to the conclusion that the defendants were responsible at common law, but that as the Act of Parliament imposed upon them the duty

The act of God no excuse in cases of negligence.

¹ Per Lord Blackburn in *River Wear Commissioners v. Adamson*, 2 App. Cas. 771; per Lord Watson in *Roths (Countess) v. Kirkcaldy Waterworks*, 7 App. Cas. 694, at p. 707; *Paradine v. Jane*, Aleyn, 26; *R. v. Leigh*, 10 A. & E. 398; 2 App. Cas. 750; 50 R. R. 463.

² *River Wear Commissioners v. Adamson*, 2 App. Cas. 750; cf. judgment of Lord Blackburn in the same case, and

his remarks on *Paradine v. Jane*, Aleyn, 26; *Roths (Countess) v. Kirkcaldy Waterworks*, 7 App. Cas. 694, H. L. Sc.; *Carstairs v. Taylor*, L. R., 6 Ex. 217; *Nichols v. Marsland*, 2 Ex. D. 1 (C. A.); L. R., 10 Ex. 255; *Harrison v. G. N. Rail. Co.*, 10 Jur., N. S. 992; *Blyth v. Birmingham Water Co.*, 11 Ex. 781.

³ 9 Ch. D. 503; 37 L. T., N. S. 330.

of keeping the wall at a certain height, and they had failed to do so, they were guilty of negligence, and responsible for the whole damage; for that where a person has a duty cast upon him, and does not perform it, he cannot rely on the act of God as any excuse at all. The Court of Appeal affirmed the decree of Fry, J., with a variation. They held that the defendants were bound at common law, independently of the statute, to keep their part of the wall at the height prescribed by the Commissioners of Sewers, and that the extraordinarily high tide, though the act of God, did not excuse them from their liability; but that they ought to have an opportunity of showing that the damage done by the act of God and the damage caused by their negligence could be ascertained and apportioned.¹

Liability
where works
are authorized
by Act of Par-
liament.

Where the bringing or storing up of water is authorized by Act of Parliament, there is no liability on the persons so authorized for damage done in the due exercise of their statutory powers,² in the absence of negligence; but an action will lie for doing that which the legislature has authorized, if it be done negligently. The law as above stated was laid down in the House of Lords in a late case, in which Lord Blackburn further defines negligence as follows:³ "I think that if, by a reasonable 'exercise of the powers, either given by statute to the promoters, 'or which they have at common law, the damage could be 'prevented, it is within this rule 'negligence' not to make such 'reasonable exercise of their powers.'"⁴

¹ 9 Ch. D. 921; 34 L. T. 453: see *ante*, Chap. I. p. 36.

² Persons obtaining from the legislature powers to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has sanctioned, and to proceed only in the mode which the legislature has pointed out; but (except in a proceeding at the instance of the Attorney-General) any one seeking the assistance of a Court of Equity to restrain the violation of such a contract with the legislature is bound to show that he has a private interest in the matter. Therefore, where a Waterworks Act empowered a company to divert the water of a stream (without limit as to quantity), by means of an open channel filled with loose stones, and they were diverting it by means of a culvert: *Held*, that another company, which was entitled to the water of a stream into which the diverted stream

had flowed, was not entitled to an injunction to restrain a violation of the terms of the Act as to the mode of diversion: *Liverpool Corporation v. Chorley Waterworks Co.*, 2 De G., M. & G. 852.

³ *Geddis v. Bann Reservoir*, 3 App. C. 430 H. L. Ir.; *Hammersmith Rail. Co. v. Brand*, L. R., 4 H. L. 171; *Lawrence v. G. N. Rail. Co.*, 16 Q. B. 643; *Weld v. Gaslight Co.*, 1 Stark. 189. See also *Collins v. Middlesex Levee*, L. R., 4 C. P. 279; *R. v. Prase*, 4 B. & A. 30; 38 R. R. 207; *Jones v. Pfestiniog Rail. Co.*, L. R., 3 Q. B. 733; *Bagnall v. L. & N. W. Rail. Co.*, 1 H. & C. 544; *Whitehouse v. Birmingham Canal*, 27 L. J., Ex. 25; *Cockburn v. Erewash Canal*, 11 W. R. 34; *Madras Rail. Co. v. Zemindar of Carrentenagarum*, 22 W. R. 865; *Green v. Chelsea Waterworks Co.*, 70 L. T. 541. See also *post*, Chap. V., pp. 268 *et seq.*

⁴ See also *Evans v. Manchester, S. &*

In the case of *Geddis v. Bann Reservoir*,¹ the defendants were authorized to collect water into a reservoir, and, when necessary, to send the waters down a channel to the river Bann. They were empowered to enter on lands to scour and cleanse channels and watercourses. They neglected to keep the channel in question cleared and scoured, so that at times it overflowed, and did damage to the lands of the adjoining proprietors. It was held that they were responsible for the damage so occasioned. In a similar case, where the damage was caused by an obstruction in a public sewer not under the control of the defendants, they were held not responsible.² A canal was made under an Act of Parliament, the minerals being reserved to the owners of the land over which it passed, who might work them on giving three months' notice to the canal owners, who, in their turn, might prevent the working on payment to the owners of the value of the minerals. The plaintiffs, the landowners, gave due notice, and the canal company refused to purchase the mines. Thereupon the plaintiffs worked the mines without negligence, but without any regard to supporting the surface under the canal. The canal owners did all in their power to keep the canal water-tight, but the water escaped and flooded the plaintiff's mines. The Court held that no action would lie for the damage so caused, for that, striking out the charge of negligence, which was negatived, the canal company were charged with nothing, but that they brought water into the canal near the plaintiff's mines, and that they had full powers under their Act to bring the water there.³

Where a railway was constructed by Act of Parliament, and carried along an embankment in lowlands adjoining a river, between the river and plaintiff's lands, the lowlands were separated from plaintiff's land by an embankment which, before the railway embankment was made, was sufficient to protect his land from the flood waters of the river, but, in consequence of the railway embankment, the flood waters were unable to spread over the lowlands as formerly, and flowed over the bank into plaintiff's lands:—held, that, although the railway company were not, by their Act, to make flood openings, yet, as they

L. Ry., 36 Ch. D. 626; 57 L. J., Ch. 153; 57 L. T. 194; and remarks of Bowen, L. J., in *Thomas v. Quartermaine*, 18 Q. B. D. 685, at p. 694.

¹ 3 App. C. 430 H. L. Ir.

² *Boughton v. Mid. & G. W. Rail.*

Co., Ir. R., 7 C. L. 169.

³ *Dunn v. Birmingham Canal*, L. R., 8 Q. B. 42; 42 L. J., Q. B. 34; 27 L. T. 683. For further cases as to the liability of canal and water companies, see Chap. V., *post*.

might, by proper caution, have prevented the injury to plaintiff, an action was maintainable; and that the compensation awarded to the owner of the land, before the railway was made, did not include the unforeseen damage in the present case.¹

Right of riparian owner to protect his land from floods.

A riparian owner on inland waters has, it would seem, an ordinary right *primâ facie* to protect his land from the inroads of flood water, provided he can do so without injury to others.² It has been already stated with regard to the sea, that every landowner exposed to its inroads has a right to protect himself by erecting such works as are necessary for that purpose; and that if he acts *bonâ fide*, he is not liable for any damage thereby occasioned to his neighbours, who must protect themselves.³ The law does not appear—except, perhaps, in the case of extraordinary floods—to give such large powers for protection to the owners on the banks of inland waters, whether tidal or not. Thus it has been laid down by the House of Lords, that riparian owners on the banks of a non-tidal river may protect their property from the invasion of the water by building a bulwark *ripe muniendæ causâ*; but that even in this necessary defence of themselves, they are not at liberty to conduct their operations so as to do any actual injury to the property on the opposite side of the river, or above or below them.⁴ “Mere apprehension, however,” says Lord Chelmsford, “will not be sufficient to found a complaint of the acts done by the opposite proprietor; because, being on the party’s own ground, they were lawful in themselves, and only became unlawful in their consequences, upon the principle of *sic utere tuo ut alienum non ledas*. But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor; and therefore, the act being *primâ facie* an encroachment, the onus seems properly to be cast upon the party doing it to show that it is not an injurious obstruction.”

No right to throw the water on to the opposite

“A proprietor on the banks of a river,” says Lord Lyndhurst,⁵ “has no right to build a mound which, according to the opinion and report of an engineer, would, if completed, in times of

¹ *Lawrence v. G. N. Rail. Co.*, 16 Q. B. 643.

² *R. v. Trafford*, 8 Bing. 204; 34 R. R. 680; 1 B. & A. 874; *Ridge v. Midland Rly.*, 53 J. P. 55.

³ See *ante*, Chap. I., p. 39; *R. v. Commissioners of Pagham Levee*, 8 B. & C. 355; 32 R. R. 406.

⁴ *Bickett v. Morris*, L. R., 1 Sc. App.

47; *Orr Ewing v. Colquhoun*, 2 App. C. 839. See *A.-G. v. Londale*, L. R., 7 Eq. 377.

⁵ *Menzies v. Breadalbane*, 3 Bli., N. S. 414 (H. L.); 32 R. R. 103; 3 Wils. & Shaw, 235; *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Bickett v. Morris*, L. R., 1 Sc. 47, *ante*, pp. 82 *et seq.*

“ordinary flood throw the water of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them. It is clear beyond the possibility of a doubt that by the law of England such an operation could not be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that old course by a sort of new water way, to the prejudice of the proprietors on the other side. The ordinary course of the river is that which it takes at ordinary times; there is also a flood channel. I am not talking of that which it takes in extraordinary or accidental floods; but the ordinary course of the river at the different seasons of the year must, I apprehend, be subject to the same principles. Erskine, in his *Institutes*, says: ‘When a river threatens an alteration of its present channel, by which damage may arise to the proprietor of the adjacent or opposite ground, it is lawful for him to build a bulwark “*ripe muniente causâ*” to prevent the loss of ground that is threatened by that encroachment.’ Though the river threatens to change its channel and to encroach upon your land, you cannot protect yourself to the prejudice of the opposite proprietor. It is true that passages may be found in the *Digest* (Roman) appearing to have a contrary tendency, but I think they may all be reconciled; and I consider the subject in this light—that these passages to which I am now alluding have reference to accidental and extraordinary casualties from the flood suddenly bursting forth; and they go to this—that in such a case the parties may, for the sake of self-preservation, guard themselves against the consequence. *Farquharson v. Farquharson*¹ is distinguishable in every particular. There it was held, that where Invercauld had erected a mound on his ground to prevent the old course of the river being (gradually) altered, and there was evidence to show that a great part of the bank was built on old foundations, and of a custom of the county for opposite proprietors to embank under these circumstances, the Court gave their opinion in favour of Invercauld.”

proprietors
in times of
ordinary
flood.

In the case of *Ridge v. Midland Rail. Co.*,² it was held, that a riparian owner on a natural stream has the right to raise the banks of the river from time to time as it becomes necessary,

¹ Cited in *Menzies v. Breadalbane*, 3 Bli. N. S. 414 (H. L.); 32 R. R. 103: ² 53 J. P. 55. 3 Wils. & Shaw, 235.

so as to prevent it from overflowing his lands, so long as he does not injure the property of others. Lord Coleridge, C. J., in delivering the judgment of the Court, says, at p. 56 of the report: "The only question that remains and was seriously argued by the plaintiffs is as to the raising of the level of the defendants' ground and its effects. The argument of the plaintiffs was to this effect: "There are two riparian proprietors and occupiers of land on the opposite banks of the same river, the land of one being some feet lower than that of the other. In ordinary times this makes no difference, because the level of the plaintiffs' land is much above the surface of the stream, but in times of flood, occurring at uncertain intervals and with uncertain volume and force, if the river overflows its banks at all, it always overflows the lower bank. That bank was the defendants'. The defendants wanted to build upon the land subject to flood; they had a right to build upon the land, and, according to all the cases, including those which have been adjudicated upon by such lawyers as Tenterden, Tindal, and Lord Esher, it is a matter of common-law right that every riparian owner is justified in preventing the river overflowing his land. Tindal, C. J., expresses his view thus: 'At common law the landowners would have the right to raise the banks of the river and brook from time to time, as it became necessary, upon their own lands, so as to confine the flood water within the banks, and to prevent it from overflowing their own lands.'¹ That is a right everybody may exercise without the slightest objection. But in improving his property the owner must not injure that of another. That, of course, assumes that the other has rights. *Sic utere tuo ut alieni* (as I prefer to express it, not *alienum*) *non lædas*. But that was not the contention of the plaintiffs. Their view was a new view to me; it was this: I shall not take the smallest care of my land; mine is the dominant tenement to yours; yours is the servient tenement; anything you do in this connection must be by my leave and license. Such a doctrine is preposterous, to say the least. The case of *Bickett v. Morris et Ux.*² has nothing to do with this case at all. The facts there were widely different. Similarly with the other cases cited by the plaintiffs; I agree with them entirely, but they do not seem to me to be any authority in support of the contention submitted to us. Judgment must therefore be entered for the defendants."

¹ *Trafford v. The King*, 8 Bing., at p. 211.

² L. R., 1 Sc. App. 47.

With regard to such extraordinary floods as would come within the definition of extraordinary casualties, it would seem, from the opinion of Lord Lyndhurst in the case just cited,¹ as well as from the words of Bramwell, B., in a late case, that a riparian owner may exercise a reasonable selfishness in protecting himself from such a common enemy.

Extraordinary floods.

In the case of *Nield v. L. & N. W. Rail. Co.*,² where a flood occurred in a canal from the bursting of the banks of an adjoining river, and the defendants, the canal company, placed a barricade across the canal above their premises, and thereby flooded the plaintiff's premises, it was held they were not liable for the damage. "The flood," says Bramwell, B., "is a common enemy against which every man has a right to defend himself, and it would be mischievous if the law were otherwise, for a man must then stand by and see his property destroyed, out of fear lest some neighbour might say, 'You have caused me an injury!' The law allows, I may say, 'a kind of reasonable selfishness in such matters; it says, 'Let every one look out for himself, and protect his own interest,' and he who puts up a barricade against a flood is entitled to say to his neighbour who complains of it, 'Why did not you do the same?' I think what is said in *Menzies v. Earl of Breadalbane* is an authority for this, and the rule so laid down is quite consistent with what one would understand to be the natural rule. Where, indeed, there is a natural outlet for natural water, no one has a right for his own purpose to diminish it, and if he does so, he is, with some qualification, perhaps, liable to any one who has been injured by his act, no matter where the water which does the mischief comes into the watercourse—I say with some qualification, because it may be that, even in the case of a natural watercourse, the riparian owner is entitled to protect himself against extraordinary floods by keeping off extraordinary water."

The flood is a common enemy.

It would seem, however, that to justify such "reasonable selfishness" that the acts done in self-defence must be done to avoid a common danger, and that no one can transfer such a danger coming on to his land to the land of another. Thus in *Thomas v. Birmingham Canal*,³ where, on the occasion of an extraordinary rainfall, the defendants opened a sluice and

¹ *Menzies v. Breadalbane*, ante, pp. 154, 155.

² L. R., 10 Ex. 4.

³ 49 L. J., Q. B. 851; 43 L. T. 435.

discharged from their canal into a brook more water than the latter was able to carry off, the consequence being that the brook overflowed into the plaintiffs' mines, and it was found that if the sluice had not been so opened the canal bank would shortly have burst; that the adjacent country and the plaintiffs' mines would have been inundated; that the course which the defendants adopted to avert such a catastrophe was a prudent one, and the only effectual one which could have been adopted in the emergency; that so far as the plaintiffs' mines were concerned the opening of the sluices caused them to be flooded sooner than they would otherwise have been, but that no additional damage was caused thereby to the plaintiffs, the inundation being inevitable by reason of the excessive rainfall and consequent accumulation of water:—The Court *held*, upon these findings, that even assuming the defendants' act to have been a wrongful one, it was *injuria absque damno*, and therefore not a ground of action; and, secondly, that the compensation clauses of the Acts of Parliament did not apply to such a case.

But in a more recent case, *Whalley v. Lancashire and Yorkshire Rail. Co.*,¹ where owing to an excessive rainfall a quantity of water accumulated on the upper side of the defendants' railway embankment, which crossed some sloping land, and they, finding that the pressure of water was causing danger to their embankment, cut trenches through the embankment and thereby caused the water to flow through and on to the land of the plaintiff, which lay at a lower level; although the jury found that the defendants had acted reasonably, regard being had to the safety of their own property, and that there was no negligence:—The Court of Appeal *held* that the defendants were liable, for what they had done was not to ward off a common danger, but to transfer to the land of the plaintiff the danger and mischief already existing on their own land.²

The Right to Water in its Natural Quality.

With regard to this subject, we propose to treat, in the first place, of the common law rights and liabilities of riparian owners with regard to water in its natural quality, and then

¹ 53 L. J., Q. B. 285; 13 Q. B. D. 131; 50 L. T. 472.

² *Menzies v. Breadalbane*, 3 Bligh, N. S. 414; 32 R. R. 103; *Queen v.*

Pagham, 8 B. & C. 355; 32 R. R. 406; *Nield v. L. & N. W. Rail. Co.*, 44 L. J., Ex. 15; L. R., 10 Exch. 4; *Scott v. Shepherd*, 1 Sm. L. C. (8th ed.) 466, were cited.

to consider the various statutes which have been passed imposing penalties on the pollution of streams, and the modifications made by them in the common law.

A riparian proprietor on a natural stream has a right to the flow of the stream through or by his land in its natural state as an incident to the land through or by which it flows, and if the water be polluted, so as to occasion damage in law, though not in fact, it gives him a good cause of action, unless a right to pollute the stream has been acquired by the person causing the pollution, by long enjoyment or grant.¹ A right to pollute a stream can only be acquired by a continuance of a perceptible amount of pollution for the full period of twenty years.² A riparian proprietor can therefore maintain a suit to restrain the fouling of the water without showing that the fouling is actually injurious to him, and the fact that the stream is also fouled by others is no defence.³ The rights of a riparian proprietor are, moreover, not restricted to the present modes of enjoyment of the water, and a new mode of enjoyment gives a right at once to sue for an injury done in respect of such new uses.⁴

At common law incident to the land through which it flows.

Pollution actionable without proof of actual injury.

In the case of *Crossley v. Lightowler*,⁵ the plaintiffs, who owned a carpet manufactory near the river Hebble, purchased from the defendants a piece of land abutting on the river and higher up the stream. The defendants erected dye works still higher up the stream, and the plaintiffs filed a bill to restrain the defendants from fouling the water of the river, both with respect to the carpet manufactory and with respect to the piece

¹ *Wood v. Wand*, 3 Ex. 748; *Embrey v. Owen*, 6 Ex. 153; *Tenant v. Goldwin*, 2 Lord Raymond, 1039. Damages cannot be recovered for "depreciation" of property "assessed separately from 'damages'" in an action for polluting a stream: *Tatton v. Staffordshire Potteries Co.*, 44 J. P. 106.

² *A.-G. v. Halifax*, 39 L. J., Ch. 129; *Goldsmith v. Tunbridge Wells*, L. R., 1 Ch. 349; *Cater v. Lewisham*, 11 Jur., N. S. 340; and *post*, Chap. IV.

³ *Crossley v. Lightowler*, L. R., 2 Ch. 478; 3 Eq. 279; *St. Helena v. Tipping*, 11 H. L. 642; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769.

⁴ *Pennington v. Brinsop*, 5 Ch. D. 769; *Holker v. Porrit*, L. R., 10 Ex. 59; *A.-G. v. Birmingham*, 4 De G. & J. 528.

⁵ L. R., 2 Ch. 478; L. R., 3 Eq. 279. In the case of *Duke of Buccleuch v.*

Crown (Court of Session Cases (Scotch), 3rd series, Vol. 5, p. 214), it was held that an upper proprietor is not entitled to throw impurities, and especially artificial impurities, into a stream so as to pollute the water as it passes through the estate of a lower proprietor; that the lower proprietor is entitled to complain of such pollution as renders the water unfit for primary purposes; but that it will be a good defence against such a complaint that the stream has been from time immemorial devoted to secondary purposes, such as manufactories, so as to supersede and abrogate the primary purposes. See L. R., 2 App. C. 344, where the judgment was affirmed, and it was held that, by the law of Scotland, in the case of the pollution of a stream, the several sufferers may combine and bring a joint action against the several authors of the nuisance.

No defence
that the
water was
polluted by
other.

of land. The plaintiffs failed to prove pollution opposite to the carpet manufactory, but as they proved pollution opposite the piece of land higher up the stream, Wood, V.-C., and Lord Chelmsford, L. C., on appeal, both held that they were entitled to an injunction, although they proved no actual injury. It was held, moreover, in the same case, following the case of *The St. Helens Smelting Co. v. Tipping*,¹ that it was no defence that the water was also fouled by other manufacturers. "Where there
"are many existing nuisances," says Chelmsford, L. C., "either
"to air or water, it may be very difficult to trace to its source
"the injury occasioned by any one of them; but if the defen-
"dants add to the former foul state of the water, and yet are not
"to be responsible on account of its previous condition, this
"consequence would follow—that if the plaintiff were to make
"terms with the other polluters of the stream, so as to have
"water free from impurities produced from their works, the
"defendants might say, 'We began to foul the stream at a
"time when, as against you, it was lawful for us to do so,
"inasmuch as it was unfit for your use, and you cannot now,
"by getting rid of the existing pollutions from other sources,
"prevent our continuing to do what, at the time when we
"began, you had no right to object to.'"²

With regard to this last point, Fry, J., observes in a late case:³
"I may observe in passing, that the case of a stream affords a
"very clear illustration of the difference between injury and
"damage; for the pollution of a clear stream is, to a riparian
"proprietor below, both an injury and damage, whilst the pollu-
"tion of a stream already made foul, unless by other pollutions,
"is an injury without damage, which would, however, at once
"become both injury and damage on the cessation of the other
"pollutions." On the same principle that the right to the flow
of pure water is a natural right of property, it is no defence to
an action for polluting a stream to show that the trade causing
the nuisance was carried on in a proper and lawful manner.⁴

Pollution in
itself an un-
lawful act,
and differs in
this respect

The pollution of water then is, in itself, an unlawful act and a nuisance, and in this differs from the diversion or obstruction of a stream, which when done in a reasonable manner and on a

¹ 11 H. L. C. 642; 35 L. J., Q. B. 66;
12 L. T. 776.

² L. R., 2 Ch., p. 482.

³ *Pennington v. Brinsop Hall Co.*, 5
Ch. D. 769.

⁴ *Stockport v. Potter*, 7 H. & N. 160;
see *Hipkins v. Birmingham*, 6 H. & N.
250; 5 H. & N. 74; *St. Helens v. Tipping*,
11 H. L. 642.

man's own land is a lawful use of property.¹ It is established law, that if filth is created on any man's land, then he whose it is must keep it, that it may not trespass;² and that, therefore, where a man, by an artificial channel or otherwise, discharges directly on to his neighbour's premises polluted water to his injury, he is liable to an action for nuisance.³ For no man can have a right to send dirty water on to another's land, unless he can prove a prescriptive right so to send dirty water.⁴ It has been further decided that there is no difference with regard to the natural right to purity of water between the cases of water flowing openly on the surface of land in a defined channel, and water trickling over the ground without any defined course, or water percolating through the soil in unknown or undefined channels.⁵ This is established by the case of *Hodgkinson v. Ennor*,⁶ where it was urged that the principles of law relating to the diversion or obstruction of percolating water established in *Chasemore v. Richards*⁷ applied equally to pollution of such water; and that, therefore, no action would lie for injury to a landowner by the pollution of percolating water, by washing lead on his land in the ordinary way. The Court, however, held, that though the person polluting the water might have a right to use it for lead-washing, yet according to the maxim, *sic utere tuo ut alienum non ledas*, he could not so use it as to injure and cause a nuisance to his neighbour.⁸

from diversion and obstruction.

Pollution of surface and percolating water actionable.

The rights of owners on artificial channels and of grantees of water have been fully discussed in an earlier part of this chapter, pp. 127 *et seq.* It remains to be considered whether the pollution of the water in such artificial channels is placed on the same footing as the diversion and obstruction of it. The result of the cases seems to be that though neither the owner of land on an artificial watercourse which is not a branch or division of a natural stream,⁹ nor the grantee or licensee of a riparian owner,

Pollution of artificial watercourses.

¹ See *ante*, p. 122 *et seq.*

² *Tenant v. Goldwin*, 2 Ld. Raym. 1089; Salk. 21, 360; Mod. 311; Holt, 500; *Hodgkinson v. Ennor*, 4 B. & S. 229; *Fletcher v. Rylands*, L. R., 3 H. L. 330.

³ *Herdman v. N. E. Rail. Co.*, 3 C. P. D. 168, C. A.; *Humphries v. Cousins*, 2 C. P. D. 239; *Broder v. Saillard*, 2 Ch. D. 692; *Bell v. Twentymann*, 1 Q. B. 768.

⁴ See *Cawokwell v. Russell*, 26 L. J., Ex. 34.

⁵ *Ballard v. Tomlinson*, 29 Ch. D.

115, *post*, p. 201. See Goldard on Easements, p. 97.

⁶ 4 B. & S. 229; 32 L. J., Q. B. 231; 8 L. T. 451; *Womersley v. Church*, 17 L. T., N. S. 190; see also *Manchester and Sheffield Rail. Co. v. Workop*, 23 Beav. 198.

⁷ 7 H. L. 349; 29 L. J., Ex. 81; see *post*, p. 191.

⁸ As to the pollution of percolating water, see *Ballard v. Tomlinson*, 29 Ch. D. 115; 54 L. J., Ch. 404; 52 L. T. 942, *post*, p. 201.

⁹ As to this see *Baily v. Clark & Morland*, 18 T. L. R. 364, *post* p. 252.

can sue a higher riparian owner for polluting the water in the natural stream,¹ a non-riparian owner who has legally appropriated part of the water is not debarred by the fact that he has no property in the water from suing a wrongdoer who discharges foul water directly upon his premises.² In *Ballard v. Tomlinson*³ the Court of Appeal have held, affirming *Womersley v. Church*,⁴ *Hodgkinson v. Ennor*,⁵ and *Tenant v. Goldwin*,⁶ that no one has a right to use his own land in such a way as to be a nuisance to his neighbour, and, therefore, if a man puts filth or poisonous matter on his land he must take care that it does not escape so as to poison water which his neighbour has a right to use, although his neighbour may have no property in such water at the time it is fouled.

Rights of
non-riparian
owners.

In the case of *Wood v. Waud*,⁷ which was the case of an artificial watercourse made for the purpose of draining certain mines, the Court held, that as the watercourse was of a temporary and uncertain nature, no rights existed or could be acquired on it so as to prevent its diversion or obstruction, but expressed an opinion that the injury caused by fouling water did not stand on the same footing as abstraction or diversion; and that though a mine owner might stop a stream of water which flowed artificially from his mines, it did not follow that he or any other could pollute it whilst it continued to run—and again, “If they “polluted the water, so as to be injurious to the tenant below, “the case would be different.”⁸

The modern cases hardly support this view of the law; and, after much difference of opinion among the learned judges who have considered the question, it would seem that the injury by pollution is placed on the same footing as other injuries to riparian rights, and that though actual injury caused by the direct discharge of foul water on the premises of another is actionable as a nuisance, the pollution of the water in a stream by a riparian owner can only be complained of by those entitled to the water as of right. In the case of *Whaley v. Laing*,⁹ it appeared that a canal had been formed through land belonging to one Anderton; and

*Whaley v.
Laing.*

¹ *Nuttall v. Bracewell*, L. R., 2 Ex. 1; *Stockport v. Potter*, 1 H. & C. 300; *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155.

² *Ballard v. Tomlinson*, 29 Ch. D. 115; 54 L. J., Ch. 404; 52 L. T. 942.

³ 29 Ch. D. 115; 54 L. J., Ch. 404; 52 L. T. 942, *post*, p. 201.

⁴ 17 L. T., N. S. 190.

⁵ 4 B. & S. 229.

⁶ 1 Salk. 21, 360.

⁷ 3 Ex. 748; 18 L. J. Ex. 305.

⁸ See also *Magor v. Chadwick*, 11 A. & E. 571; *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 L. J., Q. B. 136.

⁹ 2 H. & N. 476; 3 H. & N. 675, Ex. Chamb. See remarks on this case *ante*, pp. 134—136.

the plaintiff, by leave of Anderton and of the canal company, made a cut through the land to the canal, for the purpose of taking water from the canal to supply his engines. Chemical works were afterwards erected by the defendants, and they commenced pouring muriatic acid into the canal, which mixed with the water and passed to the plaintiff's boilers, which were thereby injured. The question was, whether the plaintiff, as he had no legal right to the water, but merely a licence to use it, could sue the defendants for the damage. The declaration stated that the plaintiff used and had and enjoyed the benefit of the water, which water had been used, and then ought to have run and flowed without pollution. The Court of Exchequer¹ held, without deciding whether the plaintiff had any possessory title in the water of the canal—so that if the defendant had stopped the flow of it to the plaintiff, or if the plaintiff, in order to get the water, had to go to the canal and draw it with a bucket, any action could have been maintained—that he was entitled to judgment on the ground that the defendant caused foul water to flow on to the plaintiff's premises without justification. They held, further, that the declaration did not mean an assertion of title in the plaintiff, but that the defendant had no right to foul the water. On appeal the Court of Exchequer Chamber² were divided in opinion. Willes and Crowder, JJ., held that the judgment of the Court below ought to be affirmed, on the ground that the plaintiff was in possession of the water, and the defendant was a wrongdoer. Crompton and Erle, JJ., held, that the declaration was bad, as it claimed indirectly a right to the flow of the water which was not supported by evidence of any legal right; but they added that they did not say that an action might not lie if a man had permission from the owner of a pond to get water for his cattle, and if a stranger, knowing the probable and natural effect of his act, poisoned the water so that the cattle were injured, that probably in such a case an action would lie; but that the right of action would be founded, not on the title or right to the water, but on the injury to the property of the plaintiff. Williams, J., held the declaration bad in substance, and that judgment should be arrested; but that the plaintiff was entitled to the verdict. Wightman, J., thought the defendants were entitled to judgment, as the plaintiff had no legal right to the water, and, that as against him, the defendants could

¹ 2 H. & N. 476.² 3 H. & N. 675.

not be considered wrongdoers. The result was that the verdict for the plaintiff was directed to stand, but judgment was arrested.¹

Stockport v. Potter.

In the case of *Stockport v. Potter*,² the majority of the Court of Exchequer, Pollock, C. B., Channell and Wilde, BB., held, that where a landowner on a natural stream conveyed to the plaintiffs, a water company, land not on riparian lands, and also the use of certain conduits and tunnels through the riparian lands, the grantees had no natural rights with regard to the stream, and, therefore, could not sue a higher riparian owner on the natural stream for the pollution of the stream, whereby the water flowing through their conduits was also polluted. Bramwell, B., dissented from this view, holding that the grantees could recover, on the general principle that where a man has property, he may grant to others rights in it, for which the grantees can sue. "In this case," he says, however, "the plaintiffs cannot rely on their mere possession of the water. They take, or perhaps, I ought to say, on their mere taking of it. For whatever *Whaley v. Laing* may have decided, it certainly decided this, that such possession was not enough to enable the possessor to maintain an action. For that case decides that the plaintiff had not alleged, or having alleged had not proved, a right to the water, and so could not recover."

Crossley v. Lightowler.

In *Crossley v. Lightowler*,³ cited above, Lord Chelmsford, L. C., held that the pollution of the water of a natural stream, which was conveyed to a mill by means of an artificial goit, was not an injury to the riparian rights of the owner of the mill, as the mill owner was not a riparian owner on the goit.

In the case of *Ormerod v. Todmorden Mill Co.*,⁴ in which the judgment of Lord Esher, M. R., is set out at p. 132, *ante*, the case of *Stockport v. Potter* was approved and followed, by the Court of Appeal, on the ground that the grant of a right to flowing water by a riparian owner is valid only against himself and cannot confer rights as against others.

Injunction to restrain pollution.

Where an action for damages by a riparian owner lies for pollution of a stream, the Courts will interfere by injunction to restrain the nuisance, even where no actual damage is proved, to prevent the inconvenience of repeated actions for damages;⁵

¹ 3 H. & N. 901.

² 3 H. & C. 300; 10 L. T. 748; see *Nuttall v. Bracewell*, L. R., 2 Ex. 1.

³ L. R., 2 Ch. 476, 36 L. J. Ch. 584; 16 L. T. 638, *ante*, p. 159.

⁴ 11 Q. B. D. 155; see also *Baily v. Clark*, (1901) Ch. D. 17 T. L. R. 239; 18 T. L. R. 364.

⁵ *Cloves v. Staffordshire Water Co.*, L. R., 8 Ch. 125, 143; 42 L. J. Ch. 107;

and also where the act done is claimed as of right, on the ground that the repetition of the act would, at the end of twenty years, establish a right in the claimant in derogation of the prior right.¹

When the right and its violation are clearly established,² a man is, in general, entitled as of course to a perpetual injunction to prevent the recurrence of the injury;³ and in the case of an injury to riparian rights by pollution, the Courts will not, except in special cases, award damages in lieu of an injunction.⁴ Where the mischief complained of is an injury to a private right, the balance of convenience and inconvenience cannot be considered, the question being simply, whether such private rights exist, and, if so, whether the Court, in the exercise of its judicial discretion, can interfere to protect them.⁵

Where the plaintiff has proved a right to an injunction, it is no part of the duty of the Court to inquire how the defendant can best remove the nuisance. The plaintiff is entitled to an injunction at once, unless the removal of the cause of injury is physically impossible; and the defendant must find his way out of the difficulty, whatever the inconvenience and expense may be.⁶ Where the difficulty of removing the injury is great, the Court will suspend the injunction for a time, to render its removal possible.⁷ Where an injunction was granted to restrain defendants from pouring sewage into a river, and execution of the order was stayed till July 1st, and defendants did not,

27 L. T. 521; *Pennington v. Brinsop Hall Co.*, 5 Ch. Div. 769; see also 24 & 25 Vict. c. 42; *Anon.*, 2 Eq. Abr. 522.

¹ *Young v. Bankier Distillery Co.*, (1893) A. C. 691; 69 L. T. 853; 58 J. P. 100 (H. L. Sc.); *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 705; *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 349; *Crosley v. Lightowler*, L. R., 2 Ch. 478; *Harrop v. Hirst*, L. R., 4 Ex. 43. See also cases *post*, pp. 243 *et seq.*; as to injunctions generally see *post*, Chap. X.

² A Court of Equity will not exercise its jurisdiction by injunction at the instance of an individual against an alleged nuisance, without a previous trial at law or without its being clearly proved that the plaintiff has sustained such substantial injury as would have entitled him to a verdict for damages in an action at law: *Elmhirst v. Spencer*, 2 Mac. & G. 45.

³ *Wood v. Sutcliffe*, 2 Sim., N. S. 166;

Imperial Gas Co. v. Broadbent, 7 H. L. 612; see Kerr on Injunctions, p. 44; and *post*, Chap. X.

⁴ *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769.

⁵ *A.-G. v. Birmingham*, 4 Kay & J. 528.

⁶ *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 163; 1 Eq. 349; 35 L. J. Ch. 382; 14 L. T. 154; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Sheffield*, 3 D. M. & G. 304; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 39 L. J., Ch. 129; 17 W. R. 1088; *Cater v. Lewisham*, 11 Jur., N. S. 340; *A.-G. v. Hackney*, L. R., 20 Eq. 631. As to balance of convenience where important public interests are involved see *A.-G. v. Birmingham*, *post*, p. 169, and cases cited *post*, p. 171.

⁷ *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Halifax*, 29 L. J., Ch. 129; *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769; *A.-G. v. Birmingham*, 4 K. & J. 328.

subsequently to July 1st, stop the nuisance, alleging that they had not yet found a way of deodorizing it, and that compliance with the order was physically impossible, it was held to be a gross and wilful contempt of Court, and sequestration was ordered to issue.¹

*Pennington
v. Brinsop
Hall.*

In granting an injunction to restrain pollution by sewage matter, it is the practice to grant an immediate injunction restraining any new communications with the river, and to suspend the operation of the order for a time to enable defendants to comply with the order by altering their works.² In the case of *Pennington v. Brinsop Hall Co.*,³ the plaintiffs, as riparian owners, sought a perpetual injunction to restrain defendants, the owners of a colliery, from polluting the waters of a stream with sulphuric acid and other deleterious matters; and the defendants pleaded that their operations caused no appreciable injury to the plaintiffs; and further, that if the injunction was granted, they would have no means of getting rid of the water from their mines, and would have to shut up their colliery, and that the water would still find its way into the stream by natural causes; and that the closing of the colliery would cause a loss of 190,000*l.* and the ruin of their company. They further urged that in lieu of an injunction damages ought to be awarded.⁴ Fry, J., however, held, that the plaintiffs had a good cause of action, though the injury to their riparian rights was unaccompanied by damage, and awarded a perpetual injunction. In delivering judgment he says, "The plaintiffs claim both as riparian proprietors, and also "as having a prescriptive right to the use of the water of the "stream for the purposes of their mill. These rights are not "denied by the defendants. The plaintiffs allege that the "defendants pollute the stream so as to create an injury to the "plaintiffs' rights; and they say, first, that this injury is "accompanied by damage; and, secondly, that if it be unaccompanied by damage, they have nevertheless a good cause of "action. This second proposition of the plaintiffs is, in my "judgment, well founded, and has scarcely, if at all, been

¹ *Spiker v. Banbury*, L. R., 1 Eq. 42.

² *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 163; 1 Eq. 349; *A.-G. v. Birmingham*, 4 K. & J. 528; 19 W. R. 561; *Pennington v. Brinsop Hall Co.*, 5 Ch. D. 769; *A.-G. v. Halifax*, 17 W. R. 1088; 39 L. J., Ch. 129; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Colney Hatch*,

L. R., 4 Ch. 146.

³ 5 Ch. D. 769.

⁴ As to this, see *Aynsley v. Glover*, L. R., 18 Eq. 544; L. R., 10 Ch. 283; *Embrey v. Owen*, 6 Ex. 353, 368; *Wood v. Sutcliffe*, 2 Sim., N. S. 163, 165; *Dent v. Auction Mart*, L. R., 2 Eq. 238; *Leech v. Schweder*, L. R., 9 Ch. 463.

“contested by the defendants. The injury alleged by the
“plaintiffs is denied by the defendants, and the first question
“which I have to decide is, do the operations of the defendants
“cause an injury to the plaintiffs? I may observe, in passing,
“that the case of a stream affords a very clear illustration of the
“difference between injury and damage; for the pollution of a
“clear stream is to a riparian proprietor below both injury and
“damage, whilst the pollution of a stream already made foul and
“useless by other pollutions is an injury without damage, which
“would, however, at once become both injury and damage on
“the cessation of the other pollutions.” (His lordship then
reviewed the evidence, upon which he came to the conclusion
that it proved that the water pumped by the defendants into the
stream caused both injury and damage to the plaintiffs. He
continued):—“It has, in the next place, been urged upon me
“that in lieu of an injunction I ought to award damages in this
“case. The argument has assumed this form. It has been
“said, and the case of *Embrey v. Owen*¹ has been referred to as
“an authority, that the cases of rights to running water, and of
“rights to air and light, are analogous; that in the case of
“injury done to the right to air and light the Court has frequently
“granted an inquiry as to damages in lieu of an injunction, and
“that it would be right and proper to follow the same course in
“this case. I am of opinion that I ought not to accede to this
“argument. In the first place, it is to be observed that the
“injury to air and light proceeds in almost all cases from a
“permanent structural obstruction; whereas the injury to water
“in the present case proceeds from a cause which varies from
“day to day, and may cease or may increase at any time.
“Hence follows a difference in the measure of damages in the
“two cases. In the case of an obstruction to light and air,
“the damages would represent the depreciation in value of
“the injured property, and so would be in the nature of a
“compensation for the injury done; whilst in the case of
“injury to the right to running water, the damages given only
“represent the past injury to the plaintiff’s right, and are,
“consequently, no compensation for the future injury. Again,
“the rights of the plaintiffs, as riparian owners, are not limited
“to their present modes of enjoyment; and a new mode of
“enjoyment gives a right at once to sue for the injury done in

¹ 6 Ex. 353; 20 L. J. Ex. 212.

“ respect of such new use, as was determined in *Holker v. Porritt*,¹
 “ and the cases there cited. It is impossible to foresee what
 “ modes of enjoyment the plaintiffs, or their successors in title,
 “ may resort to, or the extent of damages which would be a
 “ compensation for the injury which the continued pollution
 “ might cause to such new modes of enjoyment. I shall not, of
 “ course, say that, in no case of injury to riparian rights,
 “ damages should be awarded in lieu of an injunction; but I
 “ know of no case in which it has been done. In the case of
 “ *Clowes v. Staffordshire Potteries Waterworks Co.*,² the point was
 “ considered by Lord Justice Mellish; and although he was of
 “ opinion that in that case the plaintiff could only have recovered
 “ nominal damages, he nevertheless held that an injunction
 “ ought to issue, upon the ground of the inconvenience of leaving
 “ the parties to repeated and successive actions for damages.
 “ If, therefore, in the present case, there had been no evidence
 “ of actual damage, but merely evidence of injury to the riparian
 “ and prescriptive rights of the plaintiffs, I should have followed
 “ this authority; but there is evidence before me which satisfies
 “ me that the damage accruing to the plaintiffs is by no means
 “ inconsiderable. It has been suggested that there are no known
 “ modes of purifying the defendants’ water; and that obedience
 “ to the injunction will be impossible, or possible only by stopping
 “ the defendants’ works, and throwing out of employment a
 “ large number of workmen. I cannot yield to these suggestions,
 “ nor can I find any such balance of inconvenience resulting
 “ from the granting of the injunction as would have induced me
 “ to refuse it, even if I could have assessed damages in the
 “ nature of a compensation, which, for the reasons I have given,
 “ I am of opinion that I cannot do. On the whole, therefore, I
 “ am of opinion that a perpetual injunction should be awarded
 “ to restrain the defendants from discharging water from their
 “ mines and colliery into the stream, so as to cause an injury to
 “ the plaintiffs’ mill, engine, boilers, and works, or other their
 “ premises in the pleadings mentioned, or so as to cause the stream
 “ to flow to the plaintiffs’ mill and premises, in a state less pure
 “ than that in which it flowed thither previously to the commence-
 “ ment of the defendants’ pumping. If the defendants desire it,
 “ and will undertake to indemnify the plaintiffs to such an

¹ Law Rep., 10 Ex. 59; 44 L. J. Ex. 52; 33 L. T. 125.

² Law Rep., 8 Ch. 125; 42 L. J. Ch. 107; 27 L. T. 521.

“extent, and in such manner as the Court may direct, the injunction may be suspended for three months. There must be a reference as to damages sustained by the plaintiffs, and, in my opinion, the measure of these damages will be the expenses to which the plaintiffs have been put by the pollution of the stream. The defendants must pay the costs of the action.”

In the case of *A.-G. v. Birmingham*,¹ an injunction was granted to restrain the defendants from carrying out their drainage operations, so as to drive away fish and prevent cattle from drinking the water of a river seven miles below the town, where it belonged to the plaintiff. Wood, V.-C., was of opinion that the defendants were not justified in causing a nuisance by their local Act of Parliament, which incorporated the Towns Improvement Act, 1847,² and that public works must be so executed as not to interfere with private rights of individuals. It was urged, on behalf of the defendants, that if the drains were stopped the whole sewage of the town would overflow and cause a pestilence, by which 250,000 people would suffer, and that, moreover, the sewage would empty itself into the river as before. The Vice-Chancellor says, “It has been urged upon me, more than once, during the argument by the counsel for the defendants, that there are 250,000 inhabitants in the town of Birmingham, and that this circumstance must be taken into consideration in determining the question of the plaintiff’s right to an injunction.

*A.-G. v.
Birmingham.*

“I say the plaintiff’s right, rather than the right of those other members of the community on whose behalf the information is exhibited, because, as regards the latter, there may be circumstances to be taken into consideration which do not affect the question, so far as it regards the plaintiff. There are cases at law in which it has been held that where the question arises between two portions of the community, the convenience of one may be counterbalanced by the inconvenience to the other, where the latter are far more numerous. But in the case of an individual claiming certain private rights and seeking to have those rights protected against an infraction of the law, the question is simply, whether he has those rights, and, if so, whether the Court, looking to the precedents by which it must be governed in the exercise of its judicial discretion, can interfere to protect them.

¹ 4 K. & J. 528; see also *A.-G. v. Birmingham*, 19 W. R. 561. ² 10 & 11 Vict. c. 34.

“ Now, with regard to the question of the plaintiff’s right to
“ an injunction, it appears to me that so far as this Court is
“ concerned, it is a matter of almost absolute indifference
“ whether the decision will affect a population of 250,000, or
“ a single individual carrying on a manufactory for his own
“ benefit. The rights of the plaintiff must be measured precisely
“ as they are left by the legislature. Now the plaintiff’s rights
“ are these:—He has a clear right to enjoy the river, which,
“ before the defendants’ operations, flowed unpolluted—or, at all
“ events, so far unpolluted that fish could live in the stream, and
“ cattle would drink of it—through his grounds for three miles and
“ upwards, in exactly the same condition in which it flowed
“ formerly, so that the cattle may drink of it without injury, and
“ fish, which were accustomed to frequent it, may not be driven
“ elsewhere. He is entitled to the full use and benefit of the
“ water of the river just as he enjoyed them before the passing
“ of the Municipal Act, unless there be in that Act something
“ which says he is not to enjoy them any longer. That is the
“ only question I have to try; and when I have tried that
“ question, I arrive at the measure of the rights of the parties.
“ As regards the discretion the Court should exercise where such
“ rights exist, if the plaintiff finds the river so polluted as to be
“ a continuous injury to him,—if, in order to assert his right, he
“ would be obliged to bring a series of actions—one every day of
“ his life—in respect of every additional injury to his cattle, or
“ every additional annoyance to himself (not to mention the
“ permanent injury which he would sustain in having the water—
“ which, as it passes along the course of his land, is his property
“ —so damaged that he cannot use it),—then the Court will
“ properly exercise its discretion by granting him an injunction
“ to relieve him from the necessity of bringing a series of
“ actions, in order to obtain the damages to which such con-
“ tinual and daily annoyance entitles him.

“ In one respect it is true, arguments as to the discretion
“ which the Court should exercise in a case like the present may
“ very properly be addressed to it—viz., that before granting
“ an injunction and compelling the sudden stoppage of works
“ like these, inasmuch as such an injunction might produce a
“ considerable injury, the Court, by way of indulgence, would
“ afford the defendants every conceivable facility to enable them
“ to remedy the evil complained of. But when I am told that

"they have already done their utmost and spent all their money
 "in endeavouring to remedy that evil, and that now, in order
 "to discharge the duties imposed upon them, they have no
 "alternative but to override the rights of private individuals,
 "the answer is this—If they have not funds enough to make
 "further experiments, they must apply to Parliament for power
 "to raise more money. If after all possible experiments they
 "cannot drain Birmingham without invading the plaintiff's
 "private rights, they must apply to Parliament for power to
 "invade his rights; and if the case be one of such magnitude as
 "it is represented to be, Parliament, no doubt, will take measures
 "accordingly; and the plaintiff will protect himself as best he
 "may."

In cases, however, where important public interests are involved, such as the improvement of the drainage of a town, the Court will protect the private rights of the individual if affected in any *material* degree, but will at the same time have regard to the nature and extent of the alleged injury or nuisance and to the balance of inconvenience.¹

The Courts will also interfere by injunction to prevent bodies possessing parliamentary powers from exceeding or abusing those powers to the prejudice of riparian owners, it being a principle of law that persons interfering with the property of others by an Act of Parliament are strictly tied down to the limits of the powers granted by the Act,²—the question in such cases being, whether the nuisance complained of is or is not the necessary result of the works authorized by the Act.³ Thus in *Clowes v. Staffordshire Potteries Water Co.*,⁴ where defendants had power to take the water of certain springs which supplied a river on which certain mills were situate, and to make a compensation reservoir for storing water during floods for the benefit of the mill-owners, and they erected a reservoir which had the effect of

Injunctions to prevent bodies possessing parliamentary powers from abusing them.

¹ *Lillywhite v. Trimmer*, 36 L. J., Ch. 525; 16 L. T. 318; 15 W. R. 763; see also *Elmhirst v. Spencer*, 2 Macn. & G. 45; *Edleston v. Crossley*, 18 L. T. 15; see also as to this point *A.-G. v. Guardians of Dorking Union*, 20 Ch. D. 595, per Jessel, M. R., at p. 607; *A.-G. v. Acton Local Board*, cited at p. 175, *post*.

² *Oldaker v. Hunt*, 19 Beav. 425; *Glossop v. Helston Local Board*, 12 Ch. D. 102; *Metropolitan Board of Works v. L. & N. W. Rly. Co.*, 17 Ch. D. 246; *A.-G. v. Guardians of Dorking*, 20

Ch. D. 595; *A.-G. v. Acton Local Board*, 22 Ch. D. 221; 52 L. J., Ch. 108; 47 L. T. 510; and for cases under the Public Health Acts see *post*, pp. 178 *et seq.*

³ *A.-G. v. Metropolitan Board of Works*, 11 W. R. 820; see also Blackburn, J., in *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *Rex v. Pease*, 4 B. & A. 30; 38 R. R. 207.

⁴ L. R., 8 Ch. 125; 42 L. J. Ch. 107; 27 L. T. 521.

making the water of the river more muddy than it was before, and unfit for dyeing purposes; it was held that the Act gave the defendants no power to foul the water, and an injunction was granted; and further, that the compensation clauses of the *Waterworks Act of 1847* did not apply to the plaintiff's case, inasmuch as the injury was such as the water company were not authorized to commit. "I am of opinion," says James, L. J., "that this is a case pre-eminently for an application to this Court for an injunction upon two grounds. To one of these Mellish, L. J., has referred—the absolute necessity of preventing a series of actions which would be the sole result if we remitted the party to what used to be called the other side of Westminster Hall. Beyond that, it has always been the practice of this Court, and one of the main duties of this Court, to take care that the public bodies who obtained authorities under Acts of Parliament do not abuse their powers."¹

So it was held in *A.-G. v. Hackney Local Board*, that the provisions of the *Metropolitan Management Act*, 25 & 26 Vict. c. 102, s. 6, requiring a month's notice to be served before commencing proceedings against the Metropolitan Board of Works, did not affect the right of a riparian proprietor, whose stream is being polluted by the drainage works of a district board incorporated under the Act, to a summary relief by injunction, as the nuisance was not an exercise of their parliamentary powers.² Similarly it has been held that the Metropolitan Board of Works are not authorized by sect. 135 of 18 & 19 Vict. c. 120, to turn into a navigable river the whole sewage of a district, not previously drained into it, so as to create a nuisance.³ So a district board under the *Metropolitan Management Act*, 18 & 19 Vict., are not empowered by their Act to pollute water beyond the district over which the board have authority.⁴ So in *A.-G. v. Cockermouth*, Jessel, M. R., granted an injunction to restrain a local board under the *Local Government Act*, 1861 (24 & 25 Vict. c. 61), from discharging sewage by an outfall out of their district into a river so as to affect or deteriorate the water at the point of discharge, though such pollution was imperceptible at a town six miles lower down the river.⁵ "Now, if I understand the law upon the subject,"

¹ L. R. 8 Ch. 143.

² L. R., 20 Eq. 626.

³ *A.-G. v. Metropolitan Board of Works*, 11 W. R. 820; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Bir-*

mingham, 4 K. & J. 528; see *A.-G. v. Kingston*, 13 W. R. 888.

⁴ *Cater v. Lewisham*, 5 B. & S. 115.

⁵ L. R., 18 Eq. 172.

says the learned judge, at p. 178 of the report, "it is not necessary for the Attorney-General to show any injury at all. The legislature is of opinion that certain acts will produce injury, and that is enough." Moreover, when statutory powers are conferred under circumstances in which they may be exercised with a result not causing any nuisance, and new and unforeseen circumstances arise which render the exercise of them impossible without causing a nuisance, the persons so causing such nuisance are liable. Thus, where lessees of a canal company were empowered to take water from certain brooks for their canal, and the brooks became polluted and so caused the canal to become a public nuisance, they were held liable to an indictment, as their Act of Parliament did not enjoin but only empowered them to take the water in its pure state, and the legislature did not contemplate their taking it in a polluted state.¹ The Court of Chancery in the same case granted an injunction restraining the nuisance, holding that the judgment of the Court of Queen's Bench was correct, and that the fact that an appeal was pending was no bar to an injunction; and further, that it was no defence for the company to say that they did not pollute the water, they having the power to draw it in or not as they pleased.²

A local board who do not act themselves so as to cause a nuisance but neglect to perform their duty of providing a satisfactory system of drainage, are not liable to an action or injunction at the suit of an individual; but the remedy is by prerogative writ of mandamus.³

In the case of *A.-G. v. Leeds Corporation* an injunction was granted at suit of two landowners to restrain pollution by a sewer, although the sewer had existed sixteen years before bill filed. Lord Hatherley, L. C., remarks in his judgment, "The only point that really seemed to me to create any question in the cause was this, that all was done sixteen years ago; that a great deal of money was laid out in the construction of these works, and that the landowners and other persons injured might be affected by standing by and seeing an expenditure of

Acquiescence.

¹ *Reg. v. Bradford*, 6 B. & S. 631; *Reg. v. Pease* distinguished, as in that case the nuisance was the very thing contemplated by the legislature, and, therefore, the legislature had sanctioned it; 4 B. & A. 30; 38 R. R. 207.

² *A.-G. v. Bradford*, L. R., 2 Eq. 71;

see also *Manchester and Sheffield Railway v. Workop*, 23 Beav. 198.

³ *Glossop v. Helston Local Board*, 12 Ch. D. 102; *A.-G. v. Guardians of Dorking*, 20 Ch. D. 595.

⁴ L. R., 5 Ch. 583.

"money which they might know could only tend to one result, "and was only intended for one purpose, which purpose must "necessarily produce the result in question, and yet making no "complaint. I think the true answer is that which had occurred "to us before we called on Sir Roundell Palmer, viz.:—that "when any person finds that the legislature has authorized a "work to be done (and of course, the force of this is increased by "the view we have taken that the true construction of the Act is "that it is to be done without creating a nuisance) he is not to "assume it will create a nuisance. On the contrary, the presumption would be that the board would not do anything unlawful."¹

Future nuisance.

The Courts, moreover, will not interfere by injunction in the case of merely prospective injury; the nuisance must be actual and existing, and not future, however strongly the apprehension of injury may be supported by scientific evidence. In *The Attorney-General v. Kingston*,² the corporation of that town, under the *Towns Improvement Clauses Act*, proposed to make a single drain to convey into the Thames the sewage of the town, which had formerly been drained by cesspools, and also by direct communication with the river. The evidence showed that at least twice as much sewage would be thus discharged into the river, as under the old system; and two scientific witnesses³ were of opinion that the proposed works would, in the course of time, by the formation of deposits of sewage matter, have a very noxious effect, and render the water unfit for drinking or domestic purposes. The Vice-Chancellor held that the defendants were not authorized by the statute to create a nuisance, but that, looking at the Act, the mere fact of draining into a navigable river was not to be considered as a nuisance, since it was authorized to be done, provided no nuisance was thereby occasioned; that had any case of injury to cattle from drinking the water, or to the inhabitants on the banks, been at all established, or established approximately, as likely to occur, then he should conceive it was a case for interference by injunction;⁴ but that nothing like such a case was shown by the evidence, and that the information should be dismissed.

Increasing pollution.

If, however, some degree of present nuisance exists, the Court

¹ See also *A.-G. v. Halifax*, 39 L. J., Ch. 129; 17 W. R. 1088.

² 13 W. R. 888.

³ As to value of scientific evidence in cases of nuisance, see *A.-G. v. Colney Hatch*, L. R., 4 Ch. 156; *Goldsmid v.*

Tunbridge Wells, L. R., 1 Ch. 349.

⁴ See *A.-G. v. Hackney*, L. R., 20 Eq. 631; *Elliot v. North Eastern Rail. Co.*, 10 H. L. 333; 1 J. & H. 156; 2 D., F. & J. 423; *Elwell v. Crowthor*, 31 Beav. 169.

will take into account its probable continuance and increase.¹ Thus, where the sewage of a town had for many years drained into a stream passing through plaintiff's land, without perceptibly polluting it, but, for some years before filing the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity, the Court of Chancery granted an injunction restraining the draining of the sewage into the stream.² In the case of *Metropolitan Board of Works v. London and North-Western Rail. Co.*,³ where an injunction was granted to restrain the defendants from draining certain new cottages into a brook which had been converted into a sewer, James, L. J., says: "If a man has an artificial drain or sewer "by which he drains anything, either water or sewage, into his "neighbour's land, he cannot use the drain so as to drain another "close or another house. It seems to me impossible to suppose "that there is anything in the English law to say that a man has "the right to pour in as much sewage as can come from anywhere, "limited only by the size of the particular drain." This principle applies to a local board just as it does to an ordinary landowner.⁴

Although, as has been said, it is not necessary for a riparian owner to prove actual damage to enable him to sue for the interference with his right to pure water, yet it would appear that he must prove actual pollution of some character or another, and that the discharge of waste matter of an innocuous character is not actionable at common law.⁵ "It is not," says Mr. Angell,⁶ "under "all circumstances, an unreasonable or unlawful use of a stream, "to throw or discharge into it waste or impure matter: whether "such an act would be reasonable or not, in any given case, would "be a question for the jury upon its circumstances. The same "circumstances would be open for consideration, and the same "rules would govern in this case, as in respect to the abstraction, "detention, diversion, or obstruction of water in a stream. The "size and character of the stream, the uses to which it can be "or is applied, the nature and importance of the use claimed and "exercised by one party, as well as the inconvenience or injury "to the other party, would be subjects involved in the inquiry."⁷

What is
pollution.

¹ *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 349.

² *Ibid.*; see also *A.-G. v. Sheffield*, 3 D. M. & G. 304; *A.-G. v. Leeds Corporation*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 39 L. J., Ch. 129.

³ 17 Ch. D. 246.

⁴ *A.-G. v. Acton Local Board*, 22 Ch. D. 221; 52 L. J., Ch. 108; 47 L. T. 510; 31 W. R. 153.

⁵ *Kensit v. G. E. Rly. Co.*, 27 Ch. D. 122; 54 L. J. Ch. 19; 51 L. T. 862, *ante*, p. 134.

⁶ Angell on Watercourses, p. 240.

⁷ See per Lord Cairns in *Swindon*

Thus it has been held *at nisi prius* by Coleridge, J., that the merely making water temporarily muddy is not sufficient to maintain an action.¹ So by the 20th section of the *Rivers Pollution Act*,² it is provided that the word pollution shall not include, for the purposes of the Act, innocuous discoloration. "Sand and "silt" are not "sewage or filthy water" under sect. 17 of the Public Health Act, 1875.³ In the case of *Lingwood v. Stowmarket*,⁴ Wood, V.-C., held that in an order for an injunction to restrain the pollution of a stream, it is proper to insert the words "to the injury of the plaintiff," in order to establish a ground for the interference of the Court, and to prevent its authority being invoked for trivial purposes. So in *A.-G. v. Cockermouth*,⁵ Jessel, M. R., refused to grant an injunction at the suit of a local board to restrain the defendants from discharging sewage into a stream eight miles above the intake of the plaintiff's waterworks, as the evidence showed that chemical analysis failed to detect any pollution in the water at the intake of the waterworks, though it was perceptibly polluted at the point of discharge.⁶ An injunction was, however, granted at suit of the Attorney-General on the ground that the defendants had infringed the 4th section of the *Local Government Act*, 1861. "Now as I understand "the law," says the learned judge, "it is not necessary to prove any "injury at all. The legislature is of opinion that certain acts will "produce injury, and that is enough. The legislature is of opinion "that it is desirable to preserve our natural streams, at least, in "their present state of purity, and it therefore was said that you "shall not affect or deteriorate the water at all; and the Court must "presume that the deterioration of the water is an injury which "is prohibited by the legislature for good and sufficient cause."

Various sources of pollution have been held by our Courts to be actionable. Thus it has been held actionable to set up a lime pit for calf and sheep skins so near water as to pollute it;⁷ so erecting a cesspool so near a well as to contaminate it;⁸ so the

Water Co. v. Wilts and Berks Canal, L. R., 7 H. L. 697.

¹ *Taylor v. Bennet*, 7 C. & P. 329.

² 39 & 40 Vict. c. 75, *post*, p. 182.

³ *Durrant v. Branksome Urban Council*, (1897) 2 Ch. 291; 76 L. T. 739.

⁴ L. R., 1 Eq. 77; see *Dawson v. Parer*, 5 Ha. 422.

⁵ L. R., 18 Eq. 172.

⁶ See also *Lillywhite v. Trimmer*, 36

L. J., Ch. 525; 16 L. T. 318; *Ridge v. Midland Rly. Co.*, 53 J. P. 55; *Elmhirst v. Spencer*, 2 Macn. & G. 45; *Edleston v. Crossley*, 18 L. T. 15.

⁷ Year Book, Hen. II. b. 6; see *Moore v. Webb*, 1 C. B., N. S. 673.

⁸ *Norton v. Scholefield*, 9 M. & W. 565; *Womersley v. Church*, 17 L. T., N. S. 190.

letting off of water made noxious by precipitation of minerals;¹ or dye wares, or liquors, or madder, or indigo, or potash,² or sulphuric³ or muriatic⁴ acid; or discharging heated water into a stream injuriously,⁵ or sewage,⁶ or rendering water unfit for domestic or culinary purposes;⁷ or rendering it unfit for cattle to drink of,⁸ or fish to live in,⁹ or for manufacturing purposes.¹⁰

Where the pollution of a stream amounts to a public nuisance, the party causing it may be prosecuted by indictment, or proceeded against by information at the suit of the Attorney-General.¹¹ An action will also lie for a public nuisance on proof of special damage.¹²

The statutory provisions restricting the pollution of water are numerous, but with the exception of the *Rivers Pollution Prevention Act of 1876*,¹³ they are either local, or deal with the pollution of water used for special purposes.

Thus sect. 1 of the *Waterworks Clauses Act, 1847*,¹⁴ subjects to a penalty not exceeding 5*l.* every person throwing rubbish, &c. into any stream, reservoir or other works, or bathing in any stream, or causing the water of any sink, sewer, or drain, steam engine, boiler, or other filthy water to flow into any stream or reservoir belonging to any undertakers under the Act. Such person to forfeit in addition 20*s.* per diem for every day that such offence shall be committed.

The Public Health Acts and other Acts¹⁵ empowering local authorities (the place of which enactments has been taken by the *Public Health Act, 1875*, 38 & 39 Vict. c. 55, and the *Public*

¹ *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231; 8 L. T. 451; *Wright v. Williams*, 1 M. & W. 77.

² *Wood v. Sutcliffe*, 16 Jur., N. S. 75.

³ *Pennington v. Brinsop*, 5 Ch. D. 769.

⁴ *Stockport v. Potter*, 7 H. & N. 160.

⁵ *Mason v. Hill*, 5 B. & A. 1; 3 B. & A. 304; 39 R. R. 354; *Wood v. Waud*, 3 Ex. 748; *Tipping v. Echersley*, 2 K. & J. 264.

⁶ *A.-G. v. Cockermouth*, L. R., 18 Eq. 172; *A.-G. v. Leeds*, L. R., 5 Ch. 533; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Kingston*, 13 W. R. 888.

⁷ *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 349.

⁸ *A.-G. v. Birmingham*, 4 K. & J. 528; *Manchester Railway v. Workop*, 23 Beav. 198; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Oldaker v. Hunt*, 6 D., M. & G. 376.

⁹ *Bidder v. Croydon*, 6 L. T., N. S.

778; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Oldaker v. Hunt*, 6 D., M. & G. 376; *Aldred's case*, 9 Rep. 59 a.

¹⁰ *Clowes v. Staffordshire*, L. R., 8 Ch. 142; 42 L. J., Ch. 107; 27 L. T. 521; *Crosley v. Lightowler*, L. R., 2 Ch. 478; *Lingwood v. Stowmarket*, L. R., 1 Eq. 77; *Tipping v. Echersley*, 2 K. & J. 264; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Young v. Bankier Distillery Co.*, (1893) A. C. 691; 69 L. T. 830; *Tatton v. Staffordshire Potteries Co.*, 44 J. P. 106.

¹¹ See *post*, Chap. X.

¹² *Benjamin v. Stow*, L. R., 9 C. P. 430; and see *post*, Chap. X.

¹³ 39 & 40 Vict. c. 75.

¹⁴ 10 & 11 Vict. c. 17. Sect. 2 of this Act defines streams to include "springs, brooks, rivers, and other running waters."

¹⁵ See *post*, Chap. V., pp. 325 *et seq.*

Health Amendment Act, 1890, 53 & 54 Vict. c. 59) do not authorize local authorities to send sewage into a river to the prejudice of parties having established interests in the water.¹

Public Health
Acts.

By the *Public Health Act*, 1875,² sect. 392, it is provided, that "Nothing in this Act shall be construed to authorize any local authority to injuriously affect any reservoir, canal, river, or stream, or the feeders thereof, or the supply, quality, or fall of water contained in any reservoir, canal, river, or stream, or in the feeders thereof, in cases where any body of persons or person would, if this Act had not passed, have been entitled by law to prevent or to be relieved against the injuriously affecting such reservoir, canal, river, stream, feeders, or such supply, quality, or fall of water, unless the local authority first obtain the consent in writing of the body of persons or person so entitled as aforesaid." This provision comes in place of sect.

Public wells.

70 of the *Local Government Act*, 1858, and sect. 45 of the *Nuisances Removal Act*, 1855, both repealed (the latter except as to the metropolis) by the Act of 1875.³ By sect. 64 of the Act of 1875 it is enacted that, "All existing public cisterns, pumps, wells, reservoirs, conduits, aqueducts, and works used for the gratuitous supply of water to the inhabitants of the district of any local authority shall vest in and be under the control of such authority, and such authority may cause the same to be maintained and plentifully supplied with pure and wholesome water, or may substitute, maintain, and plentifully supply with pure and wholesome water other such works equally convenient; they may also (subject to the provisions of this Act) construct any other such works for supplying water for the gratuitous use of any inhabitants who choose to carry the same away, not for sale, but for their own private use."⁴ By

¹ See *Oldaker v. Hunt*, 6 De G., M. & G. 376; *Bidder v. Croydon*, 6 L. T., N. S. 778; *A.-G. v. Luton Board of Health*, 2 Jur., N. S. 180; *Manchester Railway v. Workson*, 23 Beav. 198; *Spokes v. Banbury*, L. R., 1 Eq. 42; *A.-G. v. Birmingham*, 4 K. & J. 428; *Cater v. Lewisham*, 5 B. & S. 115; *R. v. Darlington*, 5 B. & S. 515; *Goldsmid v. Tunbridge Wells*, 35 L. J., Ch. 88; L. R., 1 Ch. 349; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Cockermouth*, L. R., 18 Eq. 172; *A.-G. v. Richmond*, L. R., 2 Eq. 306; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146. See also *A.-G. v. Basingstoke*, 45 L. J., Ch. D. 726; *St. Helena Chemical Works v. St. Helena*, 1 Ex. D.

196; *Durrant v. Branksome Urban Council*, (1897) 2 Ch. 291.

² 38 & 39 Vict. c. 55.

³ Michael and Will's Law of Gas and Water, p. 212.

⁴ Under a similar section in the *Public Health (Scotland) Act*, 1867, s. 89, sub-s. 4, "A well situated on private ground, the water of which has been used for domestic purposes gratuitously by the inhabitants in the vicinity for the prescriptive period, is a public well within the meaning of the section; and the local authority can enter on the land and do all acts to the well for continuing and maintaining it, which the inhabitants might have done before.

sect. 69, local authorities, with sanction of the Attorney-General, may take proceedings by indictment, bill in chancery, action or otherwise, for the purpose of restraining pollution.¹

"And this, notwithstanding that there may be a company with a vested right to supply the inhabitants with water." *Smith v. Archibald*, 5 App. Cas. 489, H. L. Sc. (1880). See also *St. Clair v. Magistrates of Dysart*, Moor, 14, 519.

In *Holmfirth Local Board v. Shore*, 59 J.P. 344, a trough or cistern receiving the overflow from a spring at some distance had been used by the public gratuitously for watering cattle and for domestic purposes for a period of over fifty years. The defendant erected a gate to prevent the access of cattle to the trough, and let a pipe into the bottom of the trough leading into his own house, where it terminated in a stopcock, and by means of this pipe and stopcock he could draw off as much water as he pleased.

Held, that, under the Public Health Act, 1875 (38 & 39 Vict. c. 55), the trough or cistern was a public well or work used for the gratuitous supply of water to the inhabitants of the district of the local authority in which it was situate, and that it was vested in and was under the control of the local authority by force of sect. 64 of the Public Health Act, 1875, and that the local authority might maintain an action in their own name in the county court against the defendant for damages for the interference caused by the insertion of the pipe in the bottom of the trough.

In *Dungarean Guardians v. Mansfield*, (1897) 1 Ir. R. 420, under a similar section in the Public Health (Ireland) Act (41 & 42 Vict. c. 52), where a well situate on private property was freely used without hindrance or interruption, as far back as living memory went, principally by the inhabitants of some neighbouring houses, but also by all persons who had occasion to resort to the well, and a path existed during all that time affording access to the well from a public road, it was *held* that a right in the public to enter and take water from the well could not be supported by prescription, that it was too wide to be the subject of a custom, and that it could only arise from a dedication to the public by the owners from time immemorial of the land on which the well existed. But *held*, also, that *Smith v. Archibald* (5 App. Cas. 489) applied, and the well was *held* to be a public well within the Act; and that it was not necessary for the plaintiffs to establish such dedication, for if they could show that at the time

of the passing of the Act the well was a public well used for the gratuitous supply of water to the inhabitants of the district, it became by the 74th section of the Public Health (Ireland) Act, 1875 (41 & 42 Vict. c. 52), vested in the plaintiffs. That to show that the well was then a public well the plaintiffs need not prove that the soil and freehold of the well itself was public property, for if the public had a servitude attached to the soil and freehold, by virtue of which they enjoyed the right of full access to the well to obtain its water for their use, it would be a public well within the meaning of the Act.

A local authority has no power under the Public Health Act, 1875, to license a stranger to take water from a public well for commercial purposes: *Mostyn v. Atherton*, (1899) 2 Ch. 360; 68 L. J., Ch. 629; 81 L. T. 356; 48 W. R. 168.

¹ The following cases deal with the duties and liabilities of local authorities under the Public Health Acts:—

A sanitary authority in whom sewers are vested under the Act of 1875 have only a limited ownership in them; they are not in the same position as to responsibility for fouling a stream as a private individual, because they cannot stop the sewers on account of the damage to the inhabitants of the neighbourhood. And although, perhaps, the sanitary authority might obtain an injunction to restrain persons from using the sewers who had no right to do so, a landowner complaining of the nuisance cannot bring an action against them for not doing so; because an action cannot be maintained either at law or in equity to compel a person to bring an action for the purpose of restraining a nuisance which he cannot himself prevent.

Where a sanitary authority have not themselves constructed sewers which are a nuisance, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the Public Health Acts or the Rivers Pollution Prevention Act, 1876. But if they are neglecting their duty in providing a sufficient sanitary scheme for the neighbourhood, the remedy of the aggrieved landowner is by mandamus. See however 56 & 57 Vict. c. 31. *Attorney-General v. Guardians of Poor of Dorking Union*, 20 Ch. D. 595.

The duty of a local authority under

The *Public Health Act, 1875*, has been amended by 53 & 54 *Vict. c. 59 (Public Health Amendment Act, 1890)*, sect. 47 of which prohibits the throwing or placing or suffering to be thrown or placed into any river, stream, or watercourse within any district in which Part III. of the Act is adopted of "any cinders, ashes, bricks, stones, rubbish, dust, filth, or other matter which is likely to cause annoyance." Every person offending against this enactment is liable to a penalty not exceeding *forty shillings* for every fresh offence.

By sect. 21 of the *Gasworks Clauses Act, 1847*, 10 *Vict. c. 15*, and by sect. 68 of the *Public Health Act, 1875*, any person engaged in the manufacture of gas who shall cause or suffer to be brought, or to flow into any stream, reservoir, aqueduct, pond, or place for water, or into any drain or pipe communicating therewith, any washing or other substance produced in making or supplying gas, or wilfully does any act connected with the making or supplying of gas, whereby the water of such stream, &c. is fouled, shall forfeit for each offence 200*l.*, and a further sum of 20*l.* per diem for every day during which the offence is committed.¹ The same penalty for wilfully corrupting water by

sect. 15 of the *Public Health Act, 1875*, to make such sewers as may be necessary for draining their district for the purposes of the Act extends to the making of sewers sufficient not merely to carry off the ordinary sewage, but also the effluents from the manufactories in the district, provided they are not injurious to health. This obligation may be enforced by mandamus, the remedy by an application under sect. 299 to the Local Government Board not being exclusive nor a sufficient and appropriate remedy in the sense of constituting a bar to an application for a mandamus: *Peebles v. Onwaldwhistle Urban District Council*, (1897) 1 Q. B. 384.

In the year 1885 a local authority connected with one of their sewers a drain which carried the effluent from the plaintiffs' manufactory, and this connection remained, and by means of it the effluent continued to flow into the sewer, until in 1899 the local authority threatened to cut off the connection —

Held, that under sect. 21 of the *Public Health Act, 1875*, the plaintiffs had an absolute right to discharge their effluent into the sewer, and that if that right had been qualified by sect. 7 of the *Rivers Pollution Prevention Act, 1876*, the facilities given by the local authority to the plaintiffs for carrying their effluent

into the sewer ought not to be withdrawn, unless either of the provisos to sect. 7 applied, namely, unless it could be shown that the effluent would prejudicially affect the sewers or the disposal of the sewage matter conveyed along them, or would be injurious in a sanitary point of view, or that the sewers of the local authority were only sufficient for the requirements of their district.

Held, therefore, that, none of these things having been shown, the local authority must be restrained from cutting off the connection between the plaintiffs' drain and the sewer: *Eastwood v. Hanley Urban Council*, (1901) 1 Ch. 645, C. A.

¹ A private Act of Parliament enacted that "No person shall without the consent of the commissioners . . . open any new drain or other work into any of the drainage works of the commissioners . . . and no person shall cause any filthy or unwholesome water, or washings of manufactories or mines, or other foul or poisonous liquid to flow into any watercourse within the jurisdiction of the commissioners," and imposed penalties for the violation of the prohibitions. The section contained a proviso that "This section shall not apply to any person having a legal right to cause such water, washing, or

gas washings is imposed by the *Nuisances Removal Act*, 1855.¹ By sect. 25, where any water shall be fouled by gas (other than wilfully), the manufacturer is to forfeit 20*l.* for each offence, and 10*l.* per diem during continuance of offence.

By the *Thames Conservancy Act*, 1894,² ss. 90—108, any person causing any ballast, refuse, or offensive matter³ or sewage to pass into the Thames or any tributary, is liable to similar penalties. By sect. 94, the conservators are to give notice requiring the person passing the offensive matter into the stream to discontinue passing such matter; and, upon failing to comply with such notice, the person will be guilty of a misdemeanor.

Thames Conservancy Act.

Similar provisions exist in the *Lee Conservancy Act*, 1868.

So also by the *Salmon Fisheries Act*, 1861,⁴ s. 5, any person putting into any water containing salmon, or into any tributary thereof, any liquid or solid matter to such an extent as to cause

Salmon Fisheries Act.

"liquid as aforesaid to flow into any existing river, stream, or watercourse."

Before and at the time of the passing of the Act the sewage of Bridgwater flowed into the Parrett, a tidal river within the jurisdiction of the Somersetshire Drainage Commissioners. The urban authority proposed to remodel their system of drainage, and to make a new outfall into the river, in place of those previously existing,

Held (affirming the judgment of the Court below) that, assuming the tidal river to be a watercourse within the meaning of the Act, the case fell within the above-mentioned proviso, and that the commissioners had no power to prevent the carrying out of the new drainage works. The exemption in the proviso is not to be restricted to the precise amount or manner of pollution going on at the time of the passing of the Act: *Somerset Drainage Commissioners v. Bridgwater Corporation*, 81 L. T. 229, H. L. (E.), 1900.

Under a private Act of Parliament, with similar clauses, a manufacturer was held liable for damage for escape of gas washings into a well, although the site of his tank was selected by a competent engineer; and although the escape was caused by the wrongful act of a third party who had worked mines under his, the defendant's, land, and so caused a subsidence, which cracked the bottom of the tank: *Hipkins v. Birmingham Gas Co.*, 6 H. & N. 250; see also *Milington v. Griffiths*, 30 L. T., N. S. 65; see also as to Metropolitan Management Act, *Metropolitan Board of Works v. L. & N. W. Ry.*, 17 Ch. D. 246; and as to

liability of foreshore owner under the Public Health (London) Act, see *London Port Sanitary Authority v. Thames Conservators*, (1894) 1 Q. B. 647; *post*, Chap. VII.

¹ 18 & 19 Vict. c. 121, still in force as to the metropolis, though repealed generally by the Public Health Act, 1875, 38 & 39 Vict. c. 55.

² 57 & 58 Vict. c. 187.

³ Persons are not guilty of wilfully suffering offensive matter to pass into the Thames by an omission to do something which might have mitigated the evil.

The appellants, the urban sanitary authority of the borough of Chipping Wycombe, have control of sewage outfall works and a sewage farm from which water percolates and passes into the Wye stream. A large quantity of offensive liquid from the works of the High Wycombe Gas Company was discharged into the sewers, for which the gas company were convicted and fined. The liquid, mingled with the sewage, found its way into the Wye river, and thence into the Thames, and no special precautions were taken to deal with the offensive matter, though its extremely offensive character was recognised.

The justices were of opinion that there was evidence of an offence by the sanitary authority within the statute, and the appeal was on the case stated by them: *High Wycombe Corporation v. Thames Conservators*, 78 L. T. 463. See *Smith v. Burnham Local Board*, 1 Ex. D.; 34 L. T. 274.

⁴ 24 & 25 Vict. c. 109.

the water to poison or kill fish, shall incur penalties of 5*l.* for the first; 10*l.* and 2*l.* a day for the second; and 20*l.* a day for the third offence. If, however, he has used all means to render such matter harmless he will not be so liable, and *nothing* is to prevent any person from *acquiring a legal right* in cases where he would have acquired it if the Act had not passed. By sect. 13 of the *Salmon Fisheries Act*, 1873,¹ the provisions of the §2nd section of 24 & 25 *Vict. c. 97* (the *Malicious Injuries to Property Act*), so far as they relate to poisoning any water with intent to kill or destroy fish, shall be extended and apply to salmon rivers, as if the words "or in any salmon river" were inserted in the said section in lieu of the words "private right of fishing," after the words "noxious material in any fish pond."²

The Rivers
Pollution
Act.

The most important Act, however, relating to the pollution of streams is the *Rivers Pollution Prevention Act of 1876*, 39 & 40 *Vict. c. 75*, amended by 56 & 57 *Vict. c. 31*. This Act, which has for its object the prevention of the pollution of rivers, and in particular of new sources of pollution, is divided into six parts. Part I. (sect. 2) contains the law as to solid matters; Part II. (sect. 3) as to sewage pollution;³ Part III. (sects. 4—6) as to

¹ 36 & 37 *Vict. c. 71*.

² Sect. 32 of 24 & 25 *Vict. c. 97* (1861), "An Act to consolidate and amend the statute law of England and Ireland relating to Malicious Injuries to Property," provides that, whosoever shall unlawfully or maliciously put any lime or other noxious material into any fish pond or any water which shall be private property, or in which there shall be any private right of fishery, with intent to destroy any of the fish, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding *seven* years, and not less than *three* years, or be imprisoned for any term not exceeding *two* years, with or without hard labour, and without solitary confinement; and, if a malicious offence, with or without whipping.

Among other Acts the following deal with pollution:—

23 & 24 *Vict. c. 77, s. 8*, lays a penalty not exceeding 5*l.* on those fouling water of any well, fountain, or pump; and a further sum not exceeding twenty shillings per diem for every day during which the offence is continued.

28 & 29 *Vict. c. 75, s. 10*, empowers sewers authorities (defined by sect. 3 to be the mayor and burgesses, or lighting

commissioners, or vestry, or town council, or police commissioners, or parochial board) to proceed by bill, indictment or action for protection against pollution with leave of the Attorney-General. By sect. 11, nothing in the Act is to authorize any sewer to drain direct into any stream.

37 & 38 *Vict. c. 89* (An Act to amend the Sanitary Laws, 1874), s. 50, provides that "If it shall be represented to any nuisance authority in the metropolis, or to any sanitary authority, that within their district the water in any well, tank, or cistern, public or private, or supplied from any public pump, and used, or likely to be used for domestic purposes, is polluted so as to be injurious to health, such authority may apply to any justice having jurisdiction within their district in petty sessions assembled for an order to remedy the same," &c. Sect. 12 provides for the representation of riparian authorities at meetings of port sanitary authorities in case of ports containing more than one sanitary authority.

Cf. the Towns Improvement Clauses Act, 1847 (10 & 11 *Vict. c. 34*), ss. 99 and 121.

³ By 56 & 57 *Vict. c. 31*, an Act of only one section, it is enacted that "Where any sewage matter falls or flows or is

manufacturing and mining pollutions; Part IV. (sects. 7—20), administration of the law; and Parts V. (sect. 21) and VI. (sect. 22), the application of the Act to Scotland and Ireland respectively. The Act provides that it shall be illegal to put into any stream¹ (A) the solid refuse of any manufactory, manufacturing process or quarry, or any rubbish or cinders, or any other waste or any putrid solid matter² to interfere with its due flow or to pollute its waters (sect. 2); (B) any solid or liquid sewage matter (sect. 3); (C) any poisonous, noxious, or polluting liquid from any factory or manufacturing process (sect. 4); (D) any solid matter from any mine in such quantities as to prejudicially interfere with its due flow, or any poisonous, noxious or polluting solid or liquid matter proceeding from any mine other than water in the same condition as that in which it has been drained or raised from such mine (sect. 4).

In the case of sewage pollution, channels used, constructed or in process of construction at the date of the passing of the Act

"carried into any stream after passing through or along a channel which is vested in a sanitary authority, the sanitary authority shall, for the purposes of sect. 3 of the Rivers Pollution Prevention Act, 1876, be deemed to knowingly permit the sewage matter so to fall, flow, or be carried."

¹ For definition of "stream" see sect. 20. *post*, p. 187.

² In the case of *Ribble River Committee v. Halliwell*, (1899) 2 Q. B. 388; 68 L. J., Q. B. 84; 81 L. T. 38; 48 W. R. 22; 63 J. P. 708 (C. A.), sect. 2 of the Act, which prohibits the putting, or causing, or knowingly permitting to be put, or to fall into any stream, so as to pollute its waters, "any putrid solid matter," and sect. 20, which provides that "solid matter" shall not include particles of matter in suspension in water; and sect. 17, which provides "the Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water," were considered.

The defendant owned weaving sheds, worked by steam-power, on the bank of a river, and he had for the purposes of his business, for many years prior to the passing of the Act, lawfully exercised the right of diverting water from the river by means of a goit, and dealing with the same in the following manner: The water so diverted being full of substances discharged into the stream from paper manufactories, not belonging to

the defendant, higher up the stream, it had, before it could be used by the defendant for the purpose of his business, to be impounded in a reservoir and allowed to settle. Whilst it was so impounded, the substances contained therein sank to the bottom, and, after about three days, became putrescent in the form of sludge. The water at the top, when thus cleared, was taken from the reservoir and used for condensing and boiler purposes. Once a week the reservoir was cleared by opening the sluice gates into the river, and allowing the water to flow through the reservoir and out into the stream, carrying with it the sludge deposited in the reservoir. The effluent water, as it went into the stream through the sluice gates, contained 97·6 per cent. of water, and 2·4 per cent. of solid matter. It was *held*, by A. L. Smith, L. J., and Rigby, L. J. (affirming the decision of Lord Russell of Killowen, C. J., and Wills, J.), that the solid matter when it entered the stream from the reservoir was "in suspension in water" within the meaning of sect. 20, and therefore not "solid matter" within sect. 2 of the Act. *Held*, also (by A. L. Smith, L. J., Rigby, L. J., and Vaughan-Williams, L. J.), that, assuming that what was put into the stream was "solid matter" within the meaning of sect. 2, the defendant was protected by sect. 17, and therefore not liable to be proceeded against under the Act.

are excepted from it if it can be shown that the person charged is using the best practicable and available means to render the sewage harmless (sect. 4), and time may be given by the Local Government Board to any sanitary authority using such channels for the purpose of adopting such means. A person other than a sanitary authority is not to be liable for passing sewage into a stream along a drain communicating with any sewer belonging to or under the control of any sanitary authority provided he has the sanction of the sanitary authority (sect. 3).¹

In the case of liquid pollution from sewage² or a factory or

¹ In *Kirkheaton Board v. Ainslie*, (1892) 2 Q. B. 274, the defendants erected water-closets on their premises, the drains from which they connected with two small natural watercourses, which had become sewers, and were, therefore, vested in the plaintiffs, a local board. Through these sewers the sewage from the water-closets flowed by natural gravitation into a larger stream. The defendants were entitled as against the plaintiffs to connect the drains from their water-closets with these sewers under sect. 21 of the Public Health Act, 1875; but the plaintiffs had not sanctioned their so doing. The plaintiffs, under sect. 10 of the Rivers Pollution Prevention Act, 1876, applied to a county court for and obtained an order to restrain the defendants from causing the sewage to flow into the stream. On appeal against this order, it appeared to the Court that, upon the facts of the case, the plaintiffs were themselves in default in not having made any provision for dealing with the sewage in these sewers, as required by the Public Health Act, 1875:—

Held, that the making of the order was discretionary, and although the defendants had offended against the Rivers Pollution Prevention Act, 1876, as a matter of discretion, under the circumstances of the case an order ought not to be made against them at the instance of the plaintiffs, who were themselves offenders against that Act, and were seeking to avoid performance of their duty under the Public Health Act, 1875.

Held, also, that an appeal on the above-mentioned ground was correctly brought by way of motion.

By Bowen, L. J., and A. L. Smith, L. J.: An appeal from a county court on the merits under sect. 11 of the Rivers Pollution Prevention Act is, by sect. 124 of the County Courts Act, 1888, brought within the operation of

sect. 120 of that Act.

Bowen, L. J., considering the 3rd section of the Act, "every person who causes to fall or flow," &c., says (p. 283):—"It appears to me that any person causes the flow of sewage into a stream within this enactment, who intentionally does that which is calculated, according to the ordinary course of things and the laws of nature, to produce such flow. A person who causes the flow of sewage into a channel, through which by the ordinary course of gravitation it will find its way into a stream, causes it to flow into the stream." Cf. judgment of Lord Esher, M. R., to the same effect, p. 281, and *A.-G. v. Guardians of Dorling Union*, 20 Ch. D. 595.

² In the case of *Yorkshire West Riding Council v. Holmfirth Urban Sanitary Authority*, (1894) 2 Q. B. 842, the defendants, an urban sanitary authority, were charged under sect. 3 of the Act with permitting sewage matter to flow into a stream within their district. It appeared that the sewage matter flowed from certain ancient sewers, within the district of and vested in the defendants, which had been constructed and which were used for discharging sewage matter into the stream before the passing of the Act, and before the defendants were constituted a sanitary authority. The defendants had made certain alterations in these sewers, but had done nothing to increase the pollution of the stream:—The Court held that there was *prima facie* evidence that the defendants had "knowingly permitted" sewage matter to flow into the stream, and that the mere fact that they had not materially altered the nature of the sewers, and had done nothing to increase the flow of sewage matters from such sewers into the stream, was not a sufficient answer to proceedings under the Act.

Lindley, L. J., points out (p. 846) that since sect. 20 defines "person" as

manufacturing process, channels used or constructed or in process of construction at the date of the passing of the Act, or any new channel constructed in substitution thereof and having its outfall at the same spot, are excepted if it can be shown that the person charged is using the best practicable and reasonably available means to render the liquid harmless (sect. 4).

In the case of pollution from mines no offence is committed if the person charged can show that he is using the best practicable and reasonably available means to render the matter harmless (sect. 5).

Further, no proceedings are to be taken under Part III. of the Act (in the cases of manufacturing and mining pollutions) except by a sanitary authority, with the consent of the Local Government Board. If, however, the sanitary authority refuse to act, any person interested alleging an offence to have been committed may apply to the Local Government Board, who may direct the sanitary authority to proceed (sect. 6).

In giving or withholding their consent to proceedings under the Act, the Local Government Board are to have regard to the industrial interests of the locality, and the practicability of rendering harmless the liquids from the manufacturing processes without inflicting material injury to the industry of any manufacturing district, and persons in such district against whom proceedings are proposed to be taken are to have an opportunity of objecting and being heard before the sanitary authority (sect. 6).

Part IV. provides that sanitary authorities are to give manufacturers facilities for draining into their sewers any liquids not prejudicial to the sewers, or disposal of the sewage, or from a sanitary point of view, provided that the sewers are sufficient for the purpose¹ (sect. 7), and gives sanitary authorities (sect. 8)

including any body of persons, whether corporate or unincorporate, the term as used in sect. 3 includes bodies such as urban sanitary authorities as well as individuals. (See also *Glossop v. Isleworth Local Board*, 12 Ch. D. 102; *A.-G. v. Guardians of Dorking Union*, 20 Ch. D. 595; *Derbyshire County Council v. Derby (Mayor of)*, (1896) 2 Q. B. 53, 297, where it was held that proceedings under sect. 10 being not of a criminal or penal nature, interrogatories might be administered.)

¹ The High Court will not grant a

mandamus to compel a local authority under sect. 7 of the Rivers Pollution Prevention Act, 1876, to give facilities for enabling manufacturers to carry the liquids proceeding from their factories or manufacturing processes into the sewers, the remedy given by sect. 10 of that Act of an application to the county court of the district being a sufficient and appropriate remedy: *Peebles v. Orwoldwhistle District Council*, (1897) 1 Q. B. 384; see *Eastwood v. Hanley Urban Council*, *ante*, p. 180.

and the Lea Conservancy Board (sect. 9) powers to enforce the Act.¹

Legal proceedings under the Act are regulated by sections 10 to 15. County courts are empowered to make summary orders to restrain offences and perform duties or to impose penalties not exceeding 50*l.* a day during default, and to carry into effect such orders at the expense of the

¹ 51 & 52 *Vict. c. 41* (Local Government Act, 1888), *s.* 14, empowers county councils (in addition to any other authority) to enforce the provisions of the Rivers Pollution Prevention Act, 1876 (39 & 40 *Vict. c. 75*), in relation to so much of any stream as is situate within, or passes through or by, any part of their county; and it confers on them for that purpose the same powers and duties as if they were sanitary authorities within the meaning of that Act, or any other authority having power to enforce the provisions of that Act, and the county were their district (sub-sect. (1)). By sub-sect. (2), "any county council shall have power to contribute towards the costs of any prosecution under the said Act instituted by any other county council or by any urban or rural authority." The Local Government Board is also authorized by sub-sect. (3) to constitute, by provisional order made on the application of the council of any of the counties concerned, a joint committee or other body, representing all the administrative counties through or by which a river, or any specified portion of a river, or any tributary thereof, passes, and may confer on such committee or body "all of the powers of a sanitary authority under the Rivers Pollution Prevention Act, 1876, or such of them as may be specified in the Order; and the Order may contain such provisions respecting the constitution and proceedings of the said body as may seem proper, and may provide for the payment of the expenses of such committee or body by the administrative counties represented by it, and for the audit of the accounts of such committee or body, and their officers."

Under this section two important local Acts have been passed, the provisions of which contain some valuable extensions of the principles of Act of 1876—*The Mersey and Irwell Joint Committee Act*, 1892 (55 & 56 *Vict. ch. xcxi.*), and the *West Riding of Yorkshire Rivers Act*, 1894 (57 & 58

Vict. ch. clxvi.). These Acts, the preamble of both which declares that the restrictions contained in the Act of 1876 "are such as to preclude effective action by the joint committee for the improvement of the said rivers or parts thereof, and their tributaries," respectively constitute joint committees, consisting of representatives of the counties of Lancaster and Chester, and of the county boroughs of Bolton, Bury, Manchester, Oldham, Rochdale, Salford and Stockport for checking pollution in the Mersey and Irwell, and of representatives of the county council of the West Riding of Yorkshire, and of the county boroughs of Bradford, Halifax, Huddersfield, Leeds, and Sheffield for providing against that of the rivers of the West Riding and their tributaries. Cf. as to these Acts, and the provisions of the Public Health Acts on the subject, "The Statute Law relating to Rivers Pollution," by C. J. Haworth (Solicitor, B. A. Cantab., LL.B.).

The Rivers Pollution Prevention (Border Councils) Act, 1898, 61 & 62 *Vict. c. 34*, enables county councils on either side of the border to act together for the enforcement of the Rivers Pollution Prevention Act, 1876, by empowering the Local Government Board for England, and the Secretary for Scotland, on the application of the council of any of the counties concerned, to constitute a joint committee or other body representing all or any of the counties through or by which a river, or any specified portion or tributary thereof, passes, and to confer on it the powers of sanitary authorities under the Act (sect. 1). "County," as regards England, is defined by sect. 3 to mean an administrative county, and to include a county borough, and as regards Scotland, a county or burgh defined by Local Government (Scotland) Act, 1889. Sect. 2 provides for the application of sect. 297 of the Public Health Act, 1875, relating to the making of Provisional Orders for the purposes of the Act. As to liabilities of sanitary authorities see *A.-G. v. Guardians of Dorking*, ante, p. 179.

defaulter (sect. 10).¹ An appeal to the High Court by special case is given by sect. 11, and by sect. 12 a certificate by a Local Government Board inspector that the means for rendering the sewage or other solid or liquid matter harmless are the best or only practicable and available means in the particular case is to be conclusive. By sect. 13 two months' notice is necessary before commencing proceedings, and sects. 14 and 15 regulate costs and examination of witnesses, &c.

Sect. 16 is as follows: "The powers given by this Act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by Act of Parliament, law, or custom, and such other rights or powers may be exercised in the same manner as if this Act had not passed; and nothing in this Act shall legalize any act or default which would but for this Act be deemed to be a nuisance or otherwise contrary to law: Provided nevertheless, that in any proceedings for enforcing against any person such rights or powers the Court before which such proceedings are pending shall take into consideration any certificate granted to such person under this Act."

Saving
Clauses.

"17. This Act shall not apply to or affect the lawful exercise of any rights of impounding or diverting water."²

Saving of
rights of im-
pounding and
diverting
water.

Sect. 18 reserves rights under the Thames Conservancy Acts, the Lea Conservancy Acts, and the Metropolitan Management Acts.

Sect. 19 excepts local authorities empowered by Act of Parliament to carry sewage into the sea or tidal waters from liability under the Act.

Sect. 20 contains definitions, of which the most important is as follows:

"'Stream' includes the sea to such extent, and tidal waters to such point, as may, after local inquiry and on sanitary grounds, be determined by the Local Government Board, by order published in the London Gazette. Save as aforesaid, it includes rivers, streams, canals, lakes, and watercourses,

¹ *Kirkheaton Board v. Ainslie*, (1892) 2 Q. B. 274; *Yorks West Riding v. Holmfirth*, (1894) 2 Q. B. 842; see *Derby County Council v. Derby*, (1896) 2 Q. B. 53, 297; *Peebles v. Oswald-*

whistle, (1897) 1 Q. B. 384.

² As to the construction of this section see *Ribble River Committee v. Halliwell*, (1899) 2 Q. B. 388, *ante*, p. 183.

"other than watercourses at the passing of this Act mainly
 "used as sewers, and emptying directly into the sea, or
 "tidal waters which have not been determined to be
 "streams within the meaning of this Act by such order as
 "aforesaid."

Sects. 21 and 22 provide for the application of the Act to Scotland¹ and Ireland.²

Percolating Water and Water having no defined Course.

Abstraction
and diversion
of, not action-
able.

The principles of law which regulate the rights of owners of land in respect of water flowing in known and defined channels, whether upon or below the surface of the ground, do not apply to water which runs in no defined channel, or merely percolates through the strata, and no action will, therefore, lie for the abstraction or diversion of such water.³

Right to
drain surface
water for
agricultural
purposes.

Thus in the case of *Rawstron v. Taylor*,⁴ it has been held that the owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual, and its flow following no regular or definite course; and a neighbouring proprietor cannot

¹ Sect. 5 (sub-sect. 2) of the Secretary of State for Scotland Act, 1885 (48 & 49 Vict. c. 61), transfers to the Secretary all powers and duties previously "vested in" or imposed on one of Her Majesty's "Principal Secretaries of State" by the enactments specified in Part I. of the Schedule to the Act, among which is included the Rivers Pollution Prevention Act, 1876. The powers of making orders as to costs of inquiry under sects. 14 and 21, sub-sects. (4) and (8) of the Act, and with regard to inspectors under sects. 15 and 21, sub-sect. (9), are therefore now apparently vested in the Secretary of State for Scotland.

Sect. 55 of the Local Government (Scotland) Act (52 & 53 Vict. c. 50) empowers county councils in Scotland to enforce the provisions of the Rivers Pollution Prevention Act, 1876 (subject to any restrictions therein contained) "in relation to so much of any stream as is situate within, or passes through or by, any part of their county," and confers on them the powers and duties of sanitary authorities or other authorities having powers for that purpose, and also authorizes them to contribute towards the expenses of prosecutions under the

Act instituted by any other county council or sanitary authority (sub-sects. (1) and (2)). The Secretary for Scotland may also (by sub-sect. (3)), on the application of the council of any of the counties and burghs concerned, constitute by provisional order a joint committee or other body representing all the counties and burghs through or by which a river, or any specified portion or any tributary thereof, passes, and confer on it all the powers of a sanitary authority under the Rivers Pollution Prevention Act, 1876, or such of them as may be specified in the order.

² Sect. 28 of the Public Health (Ireland) Act, 1896 (59 & 60 Vict. c. 54), enacts that the expression Public Health (Ireland) Act, 1874, wherever it occurs in the Rivers Pollution Prevention Act, 1876, "shall in the application of the said Act of 1876 to Ireland, be construed as meaning the Public Health (Ireland) Acts, 1878 to 1890."

³ For definition of a stream or water-course see *ante*, pp. 58 *et seq.* As to pollution of percolating water, see *post*, pp. 200 *et seq.*

⁴ 11 Ex. 353; 25 L. J., Ex. 33.

complain that he is thereby deprived of such water which otherwise would have come to his land. So in *Broadbent v. Ramsbotham*,¹ where the plaintiff's mill for more than fifty years had been worked by the stream of a brook which was supplied by the water of a pond filled with rain, a shallow well supplied by subterraneous water, a swamp and a well formed by a stream springing out of the side of a hill, the waters of all of which occasionally overflowed and ran down the defendant's land in no definite channel into the brook; it was held that the plaintiff had no right as against the defendant to the natural flow of any of the waters. So in *Greatrex v. Hayward*,² it was held, following *Wood v. Waud*,³ that the flow of water from a drain made for agricultural purposes for twenty-one years does not give a right to the person, through whose land it flowed, to the continuance of the flow so as to preclude the proprietor of the land drained from altering the level of his drains for the improvement of his land, and so cutting off the supply.⁴

The same rules of law have, after some difference of opinion, been established in a series of cases to apply to subterranean water percolating through the strata of the earth in no definite or known course, it being now established on the highest authority that the owner of land containing underground water which percolates by undefined channels and flows to the land of a neighbour, has the right to divert or appropriate the percolating water within his own land so as to deprive his neighbour of it; and his right is the same whatever his motive may be, whether *bonâ fide* to improve his own land or maliciously to injure his neighbour, or to induce his neighbour to buy him out.⁵ Where the course of a stream is definite and notorious, the same rules of law will govern it, whether it be above or below ground.⁶ In the case of *Acton v. Blundell*,⁷ it was decided that the owner of land through which water flows in a subterranean course has

Subterranean water.

Wells.

Acton v. Blundell.

¹ 11 Ex. 602; 25 L. J., Ex. 115.

² 8 Ex. 291; 22 L. J., Ex. 137.

³ 3 Ex. 748; 18 L. J., Ex. 305.

⁴ See also *Young v. Bankier Distillery Co.*, (1893) A. C. 691; 69 L. T. 838; 58 J. P. 100 (H. L. Sc.).

⁵ *Bradford Corporation v. Pickles*, (1895) App. Cas. 587. In the above case it was held that the prohibition in sect. 49 of the Bradford Waterworks Act, 1854, against the illegal diversion, detention or appropriation of the flow of water applies only to the waters

when collected and not to the springs or sources from which the water proceeds; see also *McNab v. Robertson*, (1897) App. Cas. H. L. Sc. 129.

⁶ *Chasemore v. Richards*, 7 H. L. 349; *Dickenson v. Grand Junction Canal*, 7 Ex. 282; 21 L. J., Ex. 241; *Dudden v. Clutton Union*, 1 H. & N. 627, 630; *Wood v. Waud*, 3 Ex. 748; *Ewart v. Belfast Guardians*, 9 L. R., Ir. 172 (C. A.); see Phear, p. 33; Angell, p. 152.

⁷ 12 M. & W. 324; 13 L. J., Ex. 289.

no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations in his own land in the usual manner, drains away water from the land of the first-mentioned owner and lays his well dry. "The question argued before us," says Tindal, C. J., delivering the judgment of the Court, "has been in substance "this,—whether the right to the enjoyment of an underground "spring, or of a well supplied by such underground spring, is "governed by the same rule of law as that which applies to and "regulates a watercourse flowing on the surface. In the case "of a running stream, the owner of the soil merely transmits "the water over its surface: he receives as much from his "higher neighbour as he sends down to his neighbour below: "he is neither better nor worse,—the level of the water remains "the same. But if the man who sinks the well in his own land "can acquire by that act an absolute and indefeasible right to "the water that collects in it, he has the power of preventing "his neighbour from making any use of the spring in his own "soil which shall interfere with the enjoyment of the well.¹ He "has the power still further of debarring the owner of the land "in which the spring is first found, or through which it is "transmitted, from draining his land for the proper cultivation "of the soil; and thus by an act which is voluntary on his part, "and which may be entirely unsuspected by his neighbour, he "may impose on such a neighbour the necessity of bearing a "heavy expense, if the latter has erected machinery for the "purpose of mining, and discovers, when too late, that the "appropriation of the water has already been made. Further, "the advantage on one side, and the detriment to the other, may "bear no proportion. The well may be sunk to supply a cottage, "or a drinking place for cattle; whilst the owner of the adjoining land may be prevented from winning metals and minerals "of inestimable value. And, lastly, there is no limit of space "within which the claim of right to an underground spring can "be confined. In the present case the nearest coal pit is at a "distance of half a mile from the well. It is obvious the law "must equally apply if there is an interval of many miles. "Considering, therefore, the state of circumstances upon which "the law is grounded in the one case is entirely dissimilar from "those which exist in the other, and that the application of

¹ See *Gulgay v. G. S. & W. Rail. Co.*, 4 Ir., C. L. R. 456.

“the same rule to both would lead, in many cases, to consequences at once unreasonable and unjust, we feel ourselves warranted in holding upon principle that the case now under discussion does not fall within the rule which obtains as to surface streams, nor is it to be governed by analogy therewith.”

In *Dickenson v. The Grand Junction Canal*,¹ the Court of Exchequer held that an action would lie against a landowner for digging a well and so preventing subterraneous water from reaching a natural surface stream, which it would otherwise have reached; and this, whether the water was part of an underground watercourse, or would have reached the stream by percolating through the strata; but this opinion has been overruled by the decision of the House of Lords in *Chasemore v. Richards*.

*Dickenson v.
Grand Junction
Canal.*

In the case of *Acton v. Blundell*, just cited, the questions before the Court were two—viz., whether a landowner by sinking a shaft on his own ground, first, might lawfully intercept water and prevent it from percolating into another landowner's well; or, secondly, might so actually abstract or withdraw water from the well. Tindal, C. J., decides both in the affirmative; for says he, “If in the exercise of such right he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of action.”

The first of these two propositions has been re-asserted in the case of *Chasemore v. Richards*² by the House of Lords, affirming the judgment of the Court of Exchequer Chamber. This case, moreover, decides a point not raised in *Acton v. Blundell*, viz., that a prescriptive right by long user to the water of the well or surface stream, with which the sinking of the shaft interfered, would give no further right of action.³

Long user
gives no fur-
ther right of
action.

In *Chasemore v. Richards*,⁴ the plaintiff, who owned an ancient mill on the river Wandle, and had for more than sixty years enjoyed the use of the stream, which was chiefly supplied by percolating and underground water, lost the use of the stream after an adjoining landowner had dug on his ground an extensive well, for the purpose of supplying water to the inhabitants

*Chasemore v.
Richards.*

¹ 7 Ex. 282; 21 L. J., Ex. 241.

Kenrick, 7 C. B. 546; 18 L. J., C. P. 172.

² 7 H. L. 349; 29 L. J., Ex. 81.

⁴ 7 H. L. 349; 29 L. J., Ex. 81.

³ See also per Maule, J., in *Smith v.*

of the district, many of whom had no title as landowners. It was urged on behalf of the plaintiff, that, even granting that the defendant had a right to dig a well, and appropriate the water for the use of his own property, yet he had no right to such an unreasonable use of it, as to abstract it for the use of persons unconnected with his estates. This view seems to have been taken by Lord Wensleydale,¹ but the other learned Lords, Lords Chelmsford, Cranworth, Kingsdown, and Brougham, held that the plaintiff had no right of action: for, said Lord Chelmsford, "Before the plaintiff can question the act of the defendant, or discuss with him the reasonableness of the claim to appropriate this underground water for these purposes (whatever they may be), he must first establish his own right to have it pass freely to his mill, subject only to the qualified and restricted use of it to which each owner may be entitled, through whose land it may make its way. It seems to me that both principle and authority are opposed to such a right. The law as to water flowing in a certain and definite channel has been conclusively settled by a series of decisions, in which the whole subject has been very fully and satisfactorily considered, and the relative rights and duties of riparian proprietors have been carefully adjusted and established. The principle of these decisions appears to me to be applicable to all water flowing in a certain and defined course, whether in an open visible stream or in a known subterranean channel; and I agree with the observation of Pollock, C. B., in *Dickenson v. Grand Junction Canal Co.*,² that, 'If the course of a subterranean stream were well known, as is the case with many which sink underground, pursue for a short space a subterranean course, and then emerge again, it never could be contended that the owner of the soil, under which the stream flowed, could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover had the stream been wholly above ground.'³ But it appears to me that the principles which apply to flowing water in streams or rivers, the right to the flow of which, in its natural state, is incident to the property through which it

¹ See remarks on Lord Wensleydale's judgment in this case per Lord Watson, in *Bradford Corporation v. Pickles*, (1895) App. Cas. 589, at p. 597.

² 7 Ex. 300, 301.

³ See observations on this case by Pales, C. B., in the Irish case of *Exart v. Belfast Guardians*, 9 L. R., Ir. 172, *post*, p. 198.

“passes, are wholly inapplicable to water percolating through underground strata, which has no certain course, no defined limits, but which oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream. Whether it has been increased by floods, or diminished by drought, it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description. When does this right commence? Before or after the rain has found its way to the ground? If the owner of land, through which the water filters, cannot intercept it in its progress, can he prevent its descending to the earth at all, by catching it in tanks or cisterns? And how far will the right to this water supply extend? In this case the water, which ultimately finds its way to the River Wandle, is strained through the soil of several thousand acres—are the most distant landowners, as well as the adjacent ones, to be bound at their peril to take care to use their lands so as not to interrupt the oozing of the water through the soil, to a greater extent than shall be necessary for their own actual wants? For with Mr. Justice Coleridge I do not see here ‘how the ‘ignorance’ which the landowner has of the course of the springs below the surface, of the changes they undergo, and of the date of their commencement, ‘is material in respect of a right which does not grow out of the assent or acquiescence of the landowner, as in the case of a servitude, but of the ‘nature of the thing itself.’¹ This distinction between water flowing in a definite channel, and water, whether above or underground, not flowing in a stream at all, but either draining off the surface of the land, or oozing through the underground soil in varying quantities, and in uncertain directions, depending on the variations of the atmosphere, appears to be well settled by the cases cited in argument.” The learned lord goes on to cite *Broadbent v. Ramsbotham*,² *Rawstron v. Taylor*,³ and *Acton v. Blundell*,⁴ and continues: “Against this concurrence of authority, what is there to be offered in favour of the plaintiff but

¹ 2 H. & N. 191.² 11 Ex. 602; 25 L. J., Ex. 115.³ 11 Ex. 353; 15 L. J., Ex. 33.⁴ 12 M. & W. 324; 13 L. J., Ex. 289.

“the nisi prius case of *Balston v. Bensted*,¹ and the case of “*Dickenson v. Grand Junction Canal*”² With respect to *Balston v. Bensted*, it does not appear that the question of the right to “water percolating through the strata, as contradistinguished “from water flowing in a visible stream, was ever presented “to Lord Ellenborough’s mind. With respect to the case of “*Dickenson v. Grand Junction Canal*, upon which the plaintiff “also relied, after the observations made upon it by Mr. Justice “Cresswell in the Exchequer Chamber,³ and by Mr. Justice “Wightman in delivering the opinion of the judges to this “House,⁴ it is unnecessary for me to say more, than that I “entirely agree with them, and think that it can hardly be “regarded as a satisfactory decision upon the point under con- “sideration. It appears to me that reason and principle, as “well as authority, are opposed to the claim of the plaintiff to “maintain an action for the interception of the underground “water, which would have ultimately found its way into the “River Wandle; and that, therefore, the judgment of the “Exchequer Chamber ought to be affirmed.”

*Reg. v. Metro-
politan Board
of Works.*

Following this decision, it has been held in *Reg. v. Metropolitan Board of Works*,⁵ that a landowner was not entitled to compensation under the *Metropolitan Sewers Act* (11 & 12 Vict. c. 112), for the abstraction of water from underground springs, which rose in his lands and fed his ponds, by a sewer made under the provisions of the Act, in neighbouring lands.

The judgment of the Court was founded on the principle that where compensation is given for damages done from works authorized by an Act of Parliament, such compensation can only be claimed where the damage would have been ground of action if arising from the act of a private individual, and that as the abstraction of underground percolating water was not actionable, compensation could not be claimed. Cockburn, C. J., dissented from this judgment on the ground that under the 50th section of the Act, which provided that compensation should be given “where any work shall interfere with or prejudicially “affect any ancient mill or any right connected therewith, or “other right to the use of water,” the plaintiff was entitled to compensation; for though he might have no legal right to the

¹ 1 Camp. 463.

² 7 Ex. 282.

³ 2 H. & N. 168.

⁴ 7 H. L. 369.

⁵ 3 B. & S. 710; 9 Jur., N. S. 1008; 32 L. J., Q. B. 105.

water till it had risen into the pond, the defendants by preventing the water from rising and becoming the subject of legal right, had prejudicially affected the plaintiff's right to it.

Following this case, the Irish Court of Appeal has held that underground water not flowing in a known channel is not the subject of property or capable of being granted.¹

So in *Brain v. Marfell*,² where defendant sold to plaintiff a well, and the right of conveying water therefrom through defendant's land without interruption or disturbance, the Court of Appeal held that defendant had only conveyed the flow of the water after it had risen in the well, and that no action would lie for the interception of percolating water before it reached the well.

So the Privy Council³ has held that where a landowner has granted the surface to another, retaining the mines beneath it, the mine-owner is not responsible in the absence of express agreement,⁴ if in working the mines he drains the water from the surface.

In the case of *Bradford Corporation v. Pickles*,⁵ the House of Lords, agreeing with *Chasemore v. Richards*, decided that where a statute provides that it shall be unlawful for a person other than a company authorized to supply water to a town to "divert, alter, "or appropriate in any manner other than by law they may be "legally entitled," water flowing from particular springs, the object of the statute is to give protection to the supply of water acquired by the company, and not to prevent a neighbouring landowner from making a legitimate use of water running from or percolating through his land before it reaches the company's supply and becomes part of their undertaking.

In the case of *M'Nab v. Robertson*,⁶ a lessor demised by lease a distillery, cottages, thirteen and a half acres of land, with two ponds, "together with right to the water in the said ponds and "in the streams leading thereto." The lease also contained the usual warrandice clause. The lessor sank a tank on ground outside but adjoining the demised subjects, and drew off from marshy ground percolating water which would have found its way eventually into one of the ponds. The House of Lords held (Lord Halsbury, L. C., dissenting), affirming the decision of the Second Division of the Court of Session, that water percolating

¹ *Ewart v. Belfast Poor Law Guardians*, 9 L. R., Ir. 172, *post*, p. 198.

² 41 L. T., N. S. 455.

³ *Ballacorkish Co. v. Harrison*, L. R., 5 P. C. 49; 43 L. J. P. C. 19; 29 L. T.

658.

⁴ As to effect of express agreement, see *post*, pp. 210 *et seq.*

⁵ (1895), App. Cas. 587.

⁶ (1897), App. Cas., H. L. Sc. 129.

through the ground towards the pond was not water in any stream leading to the pond: it was held secondly, by the whole House, that assuming an implied obligation on the part of the lessor not to diminish the water supply to the ponds, there had been no breach.¹

Abstraction
of water
actually in
a well.

It has, moreover, been decided that where water which has actually percolated into, and is in a well, has been abstracted by operations in the adjoining land, no action will lie.² Thus, in the *New River Co. v. Johnson*,³ where a well of the respondent was drained by a sewer constructed by the appellants under a local Act incorporating the *Waterworks Clauses Act*, 10 & 11 Vict. c. 17, the Court of Queen's Bench held that as on the authority of *Acton v. Blundell*,⁴ and *Chasemore v. Richards*,⁵ no action would have lain for what was done, the statute gave the respondent no right to compensation. Crompton, J., says, "The only matter about which there could reasonably be any doubt is whether, but for the Act of Parliament giving the appellants power to construct their works, the respondent would have had a good cause of action against them for abstracting from the well water which had already percolated into it. Had this been a case of water running in a defined stream, I should have been sorry to give a positive opinion that the abstraction of it might not have afforded her a cause of action. There may be some distinction between such a case and the present one, of water merely percolating; as to which *Acton v. Blundell*⁴ shows conclusively that no action will lie, and that the only remedy of the owner of a well, from which such water has been abstracted, is to sink the well deeper. That is a decision of the Court of Exchequer Chamber of great authority; and the case of *Dickenson v. Grand Junction Canal*, in the Court of Exchequer,⁶ not only does not and could not overrule it, but is itself virtually overruled by the judgment of the House of Lords in *Chasemore v. Richards*,⁵ in which *Acton v. Blundell*⁴ is approved and acted upon."

Actually in a
defined sur-
face channel.

In conformity with the doubt expressed by Crompton, J., it has been held by Lord Hatherley, L. C., in *Grand Junction Canal v. Shugar*,⁷ that although a landowner will not, in general,

¹ For Lord Watson's definition of a "stream" in this case see *ante*, p. 59.

² A local authority has no right to authorize a stranger to take water from a public well for commercial purposes. Per Byrne, J., in *Mostyn v. Atherton*, *post*, p. 197.

³ 2 El. & Bl. 435; 29 L. J., M. C. 93; 1 L. T. 295.

⁴ 12 M. & W. 324.

⁵ 7 H. L. 349; 29 L. J. Ex. 81.

⁶ 7 Ex. 282.

⁷ L. R., 6 Ch. 483; 24 L. T. 402.

be restrained from drawing off the subterranean waters in the adjoining land, yet he will be restrained if, in so doing, he draws off water flowing in a defined surface channel through the adjoining land. Lord Hatherley says, "The point most closely pressed on me by Mr. Eddis and Mr. Lindley was this—how can you distinguish the case of a well where the water has been secured, from the case of running water? That is answered at once by the decision in the case of *Chasemore v. Richards*, and the distinction is plain. If you are simply using what you have a right to use, and leaving your neighbour to use the rest of the water as it flows on, you are entitled to do so; but you must not appropriate that which you have no right to appropriate to yourself. In this case there is, *ex concessis*, a defined channel in which this water was flowing, and I think the evidence is clear that some of it is withdrawn by the drain which the local board have made. As far as regards the support of the water, all one can say is this: I do not think *Chasemore v. Richards*, or any other case, has decided more than this, that you have a right to all the water which you can draw from the different sources which may percolate underground; but that has no bearing at all on what you may do with regard to water which is in a defined channel, and which you are not to touch. If you cannot get at the underground water without touching the water in a defined channel, I think you cannot get at it at all. You are not by your operations, or by any act of yours, to diminish the water which runs in this defined channel, because that is not only for yourself, but for your neighbours also, who have a clear right to use it, and have it come to them unimpaired in quality and undiminished in quantity."¹ This right is not affected by the fact that at some remote period the source of the spring has been built round and formed into a well in order to improve its mode of issuing from the earth, thus making an artificial channel for a short distance.²

From a consideration of the above cases, it seems that water in a defined and known underground channel is placed on the

Water actually in a defined underground channel.

¹ As to rights and liabilities of mine owners with regard to water, see *ante*, pp. 138 *et seq.*; and as to canals, see *Stourbridge Canal v. Dudley*, 30 L. J., Q. B. 108; *Dudley Canal v. Grazebrook*, 1 B. & A. 59; 35 R. R. 212; *Cromford Canal v. Cutts*, 5 R. C. 442; *Birmingham*

Canal v. Dudley, 7 H. & N. 989; *Dunn v. Birmingham*, L. R., 8 Q. B. 42, *post*, Chap. V., pp. 281—294; and *Midland Rly. v. Checkley*, L. R., 4 Eq. 19; 26 L. J., C. P. 386.

² *Mostyn v. Atherton*, (1899) 2 Ch. 360; 68 L. J. 629; 81 L. T. 356.

same basis as water in a defined surface channel.¹ "I see no reason," says Lord Watson,² "to doubt that a subterranean flow of water may in some circumstances possess the very same characteristics as a body of water running on the surface." It has been, however, held in the Irish case of *Ewart v. Belfast Guardians*,³ that the principle of *Chasemore v. Richards* as to percolating water applies to water flowing subterraneously in a channel which was and by excavation could have been ascertained to be defined, if such channel is not actually known. Palles, C. B., in his judgment quotes the judgment of Lord Cranworth in *Chasemore v. Richards*, as follows: "The right to running water has always been properly described as a natural right just like the right to the air we breathe. They are the gifts of nature, and no one has a right to appropriate them. There is no difficulty in enforcing that right, because running water is something visible, and no one can interrupt it without knowing whether he does or does not do injury to those who are above or below him. But if the doctrine were to be applied to water merely percolating, as it is said, through the soil, and eventually reaching some stream, it would always be a matter that would require the evidence of scientific men to state whether or not there had been interruption, and whether or not there had been injury. It is a process of nature not apparent, and therefore such percolating water has not received the protection which water running in a natural channel on the surface has always received. If the argument of the plaintiff were adopted, the consequence would be that every well ever sunk would have given rise, or might give rise, to an action." "All this reasoning," continues the learned C. B., "applies equally well to the present case. Here, too, the evidence of scientific men is necessary, and has been largely resorted to. If the doctrine contended for here were true, the sinking of any well might give rise to an action. It might interfere with an unknown subterranean stream."

In the subsequent Irish case of *Black v. Ballymena Commissioners*,⁴ a "defined" channel is said to mean "a contracted and bounded channel, although the course of the stream may be undefined by human knowledge;" and "known" is said to mean "the knowledge by reasonable inference from existing and observed facts in the natural or pre-existing condition of the

¹ See *Chasemore v. Richards*, ante, H. L. Sc. 129.
p. 191.

² 9 L. R., Ir. 172.

³ *M'Nab v. Robertson*, (1897) App. Cas.

⁴ 17 L. R., Ir. 457.

“surface of the ground,” and not to be synonymous with “visible,” nor is it restricted to knowledge derived from exposure of the channel by excavation.

As to *Ewart v. Belfast Poor Law Guardians*,¹ “which,” the Vice-Chancellor observes, “approaches much more closely to the present case than the others which have been referred to; it decides that in order to apply the rule as to riparian rights to subterranean water, it must flow not only in a defined channel but in a known channel, giving to the word ‘known’ a sense beyond what is conveyed by the word ‘defined.’ In that case the water had not in any case flowed in a surface stream in a defined channel. It was only discovered by deep excavations made in the land under which the water flowed, and even then it was a matter of controversy and doubt whether there was any defined channel, as to which the experts examined on each side, as usual, expressed opposite opinions.”²

An owner of land has, on the same principle as governs the foregoing cases, no right at common law to the support of subterranean water.

Support from
subterranean
water.

In *Popplewell v. Hodgkinson*,³ the owner of land granted to him for building purposes, subject to a chief rent, granted a portion of it to the plaintiff, subject to a similar rent, and subsequently granted the remaining adjoining portion to certain trustees for erecting a church. The defendant, a builder employed by the trustees, by necessary excavations drained the land of the plaintiff, so that the soil subsided, and certain cottages thereon became thereby cracked and damaged. The Court of Exchequer Chamber held, affirming the judgment of the Court of Exchequer, that the plaintiff had no right of action. Cockburn, C. J., says, delivering the judgment of the Court: “Although there is no doubt that a man has no right to withdraw from his neighbour the support of adjacent soil, there is nothing at common law to prevent his draining the soil, if for any reason it becomes necessary or convenient for him to do so. It may be, indeed, that where one grants land to another for some special purpose,—for building purposes, for example,—then, since according to the old maxim a man cannot derogate from his own grant, the grantor could not do anything whatever with his own land

¹ 9 L. R., Ir. 172.

² L. R., 4 Ex. 248; 38 L. J., Ex. 126;

³ See further as to conveyances of percolating water, *post*, pp. 210 *et seq.* 17 W. R. 806 (Ex. Ch.).

" which might have the effect of rendering the land granted less fit
 " for the special purpose in question than it otherwise might have
 " been." His Lordship goes on to say that there is nothing in the
 present case from which an implied condition could be inferred to
 prevent the defendant using his land in the ordinary manner.

So in *Elliot v. N. E. Rail. Co.*,¹ it has been held by the House
 of Lords that, where the owner of an accidentally drowned mine
 sold land to a railway company for the purpose of building a bridge
 under an Act of Parliament, reserving to him the right to work the
 minerals, provided no damage was done thereby to the railway, and
 the land sold derived additional support from the water in the
 mine, the railway company was not entitled to an injunction to
 restrain the mine owner from draining the mine in the ordinary
 way, and restoring it to a working condition, although the mine
 had been in a drowned state and abandoned for forty years.²

Pollution of
 percolating
 water.

Although no action will lie for the diversion or abstraction of
 percolating water, the law is otherwise with regard to its pollu-
 tion. The principle on which this distinction rests is expressed
 by the maxim, "*Sic utere tuo ut alienum non ledas.*"

In the case of *Hodgkinson v. Ennor*,³ the plaintiff owned a
 mill, and proved an immemorial right to the pure flow of a stream
 from a natural cavern into which rain water ran by underground
 passages. The defendant, the owner of land on a hill above
 the cavern, and in the process of lead working, discharged
 polluted water from pits through drains and natural rents in the
 rock into the aforesaid cavern. It was argued for defendant that
 he had a right to work his mines in the ordinary way, and that,
 on the authority of *Chasemore v. Richards*, no action would lie
 for any interference with underground percolating water; at
 least, unless an indictable nuisance was created. The Court of
 Queen's Bench held, however, that the plaintiff had a cause of
 action. Blackburn, J. : " I take the law to be as stated in *Tenant*
v. Goldwin,⁴ that you must not injure the property of your neigh-
 " bour, and that, consequently, if filth is created on any man's
 " land, then, in the quaint language of the *Report in Salk*. 361,
 " ' he whose dirt it is, must keep it that it may not trespass.' "

¹ 10 H. L. Cas. 333; 29 L. J., Ch. 308.
 See also *Earl Ripon v. Hobart*, 3 Myl. &
 K. 169; 41 R. R. 40; *Dudley Canal v.*
Grazebrook, 1 B. & A. 59; 35 R. R. 212;
Stourbridge Canal v. Dudley, 30 L. J.,
 Q. B. 108; *Birmingham Canal v. Dudley*,
 7 H. & N. 969; *Birmingham Canal v.*

Swindell, 7 H. & N. 980, n.

² For cases relating to support under
 Canal Acts, see *post*, pp. 281 *et seq.*

³ 4 B. & S. 229; 32 L. J., Q. B. 231;
 8 L. T. 451.

⁴ 2 Ld. Raym. 1089; Salk. 21, 360;
 6 Mod. 311; Holt, 500.

So, in *Womersley v. Church*,¹ Lord Romilly, M. R., granted an injunction to restrain the defendant from deepening his cesspool, so as to cause polluting matter to percolate through the soil, and foul the plaintiff's well. The cases of *Magor v. Chadwick*,² and *Wood v. Waud*,³ also draw distinction between the right to divert and the right to pollute water arising from temporary causes.

This question was thoroughly discussed in the case of *Ballard v. Tomlinson*,⁴ where the Court of Appeal laid down that no one has a right to use his own land in such a way as to be a nuisance to his neighbour, and therefore, if a man puts filth or poisonous matter on his land, he must take care that it does not escape so as to poison water which his neighbour has a right to use, although his neighbour may have no property in such water at the time it is fouled.

The plaintiff and defendant were adjoining landowners, and had each a deep well on his own land, the plaintiff's being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water that percolated underground from the defendant's to the plaintiff's land, and consequently the water which came into the plaintiff's well from such percolating water when he used his well by pumping, came adulterated with the sewage from the defendant's well. The Court held (reversing the decision of Mr. Justice Pearson⁵) that the plaintiff had a right of action against the defendant for so polluting the source of supply, although until the plaintiff had appropriated it, he had no property in the percolating water under his land, and although he had appropriated such water by the artificial means of pumping.

It was argued for the defendants by the Solicitor-General (Sir F. Herschell) that the plaintiff had no case: *first*, because the defendants did not pollute any water in which the plaintiff had any property; and *secondly*, because the act complained of was done by the defendants on their own land, as they had a right to do, and nothing obnoxious would have passed to the plaintiff's well but for the act of the plaintiff himself. As the water percolates underground and does not flow in a defined channel, no one has any property in it (*Chasemore v. Richards*, 7 H. L. C. 349).

¹ 17 L. T., N. S. 190.

² 11 A. & E. 571; 9 L. J., Q. B. 159.

³ 3 Ex. 748; 18 L. J., Ex. 305. See also *Sutcliffe v. Booth*, 32 L. J., Q. B. 136.

⁴ 29 Ch. D. 115; 54 L. J., Ch. 404; 52 L. T. 942.

⁵ 26 Ch. D. 194.

*Ballard v.
Tomlinson.*

In answer to this, Brett, M. R., says :¹—"The nearest case to the present I take to be the case of *Womersley v. Church*.² I think that that case does show that the first proposition of the Solicitor-General is wrong, but I do not think that it governs the second point taken by him. I think that second point is partly noticed in the case of *Whaley v. Laing*,³ but it does not in my opinion want any authority. I disagree with the decision of Mr. Justice Pearson on this ground, that although nobody has any property in the percolating water, yet such water is a common source which everybody has a right to appropriate, and that, therefore, no one is justified in injuring the right of appropriation which everybody else has." Cotton, L. J., says :¹ "I also am of opinion that the decision appealed from is erroneous. As I understand the judgment of Mr. Justice Pearson on the first point, namely, that this was underground water in an indefinite channel, he thought that his decision was a necessary consequence of *Chasemore v. Richards*. Now *Chasemore v. Richards*⁴ simply decided this, as I understand it, that every man has a right to take all the underground water (by which I mean water going in no definite channel) which he can find in his own land, notwithstanding that the effect of his doing so may be that his neighbour will have no underground water in his own land, or that the stream which he owns will be diminished in consequence of the underground water which has been so appropriated not coming into that stream. That in no way decides the present case. . . . All that the House of Lords decided was that the plaintiff could not complain of a defendant exercising that natural right in taking the water high for the time being was under his own soil. But here the defendants are not doing that, but are simply putting filth on their own land in such a way as that it gets into the underground water in the stratum common to themselves and other persons. In my opinion, therefore, it is no necessary consequence of *Chasemore v. Richards*⁴ to say here the plaintiff cannot complain of the act of the defendants."

Lindley, L. J., after stating that the question decided in *Acton v. Blundell*,⁵ and *Chasemore v. Richards*,⁴ was "the right of a landowner to remove underground water from his own land when

¹ 29 Ch. D., at p. 122.

² 17 L. T., N. S. 190.

³ 2 H. & N. 476 ; 3 H. & N. 675, 901.

⁴ 7 H. L. C. 349.

⁵ 12 M. & W. 324.

“that water did not flow in any visible defined channel” and discussing these decisions, says:¹ “The right to foul water is not “the same as the right to get it, and in my opinion does not depend “on the same principles. *Primâ facie* every man has a right to “get from his own land water which is naturally found there, but “it frequently happens that he cannot do this without diminish- “ing his neighbour’s supply. In such a case a man must “submit to the inconvenience. But *primâ facie* no man has a “right to use his own land in such a way as to be a nuisance “to his neighbour, and whether the nuisance is effected by “sending filth on his neighbour’s land, or by putting poisonous “matter on his own land and allowing it to escape on his “neighbour’s land, or whether the nuisance is effected by “poisoning the air which his neighbour breathes, or the water “which he drinks, appears to me wholly immaterial. If a man “chooses to put filth on his own land he must take care not to “let it escape on to his neighbour’s land, *Tenant v. Goldwin* “(1 Salk. 21, 360), and not to let it poison the air which reaches “it; *Comyns’ Dig.* (Action on the Case for Nuisance, A). So, “if a man chooses to poison his own well, he must take care not “to poison waters which other persons have a right to use as “much as himself.”²

¹ 29 Ch. D., at p. 126.

² The decisions as to the pollution of water in which the person complaining has no legal “property” are very conflicting. See *Stockport Water Co. v. Potter*, 3 H. & C. 300; *Whaley v. Laing*,

3 H. & N. 675; *Cressley v. Lightowler*, L. R., 3 Ch. 478; *Wood v. Waud*, 3 Ex. 748; *Ormerod v. Todmorden Mill Co.*, 11 Q. B. D. 155, and *ante* pp. 127, *et seq.*, and 161 *et seq.*, where the question is discussed.

CHAPTER IV.

OF ACQUIRED RIGHTS OF WATER, AND THE EASEMENT
OF WATERCOURSE.

Acquired
rights of
water termed
easements.

In addition to the natural right to receive flowing water in its accustomed course, rights, the object of which is to interfere with the natural course of the stream, may be acquired over a stream flowing through a man's land or through his neighbour's land. Thus a right may be acquired to throw back upon the land of proprietors higher up the stream the water which, unless so reflected, would by the force of gravity pass from it; or to discharge the water upon the land lying lower down the stream either injured in quality, or with a degree of force greater or less than the natural current.¹

Such acquired rights are termed *easements*.

Definition of
easement.

An easement may be defined as a service or convenience which one neighbour hath, without profit upon, over, or from any land or water of another.²

An *easement* (under which head all acquired rights of water are classed) differs from a *profit à prendre*, in that the former is merely a right to do some act which, if done without such right, would be a simple trespass on another's property, while a *profit à prendre* carries with it a right to take and appropriate a portion of the soil and its produce.³

Easements must be used in connection with some tenement, and cannot, as hereditaments, be created or acquired in gross.⁴

The tenement in respect of which an easement is used is termed the *dominant tenement*; and the tenement upon, over, or from which it is used is termed the *servient tenement*.

¹ Gale on Easements, 7th ed. by George Cave, 1899, p. 250; *Sampson v. Hoddinot*, 1 C. B. N. S. 611; 26 L. J., C. P. 148.

² Co. Lit. 19, 20; see also Angell on Watercourses, p. 244; *Hewlins v. Shipham*, 5 B. & C. 221; 31 R. R. 757; *Manning v. Waddale*, 5 A. & E. 764; 44 R. R. 576; *Hace v. Ward*, 4 E. & B. 702.

³ Phear, Rights of Water, p. 57; *Race v. Ward*, 4 E. & B. 702; 24 L. J., Q. B.

153; *Manning v. Waddale*, 5 A. & E. 764; 44 R. R. 576; *Goodman v. Saltash Corporation*, 7 App. Cas. 633; *Tilbury v. Silta*, 45 Ch. D. 98; 62 L. T. 254.

⁴ *Ackroyd v. Smith*, 10 C. B. 164; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 637; *Hill v. Tupper*, 2 H. & C. 121; and see also remarks on the last case by Bramwell, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 11; 36 L. J., Ex. 1.

Considered with reference to the servient tenement, an easement is frequently termed a *servitude*.

The easements relating to water may be classified thus:¹—

Easement of water.

1. The right to affect or use the water of a natural stream in any manner not justified by natural right—

(a) In quantity ;

(b) In quality.

2. The right to conduct water across a neighbour's land by an artificial watercourse, and to go on his land for the purposes of clearing it.

3. The right to discharge water or other matter on a neighbour's land.

4. The right to go on a neighbour's land to draw water from a well.

It is proposed to consider, first, how these easements may be acquired ; and, secondly, the nature, extent, and mode of enjoyment of the above-named particular easements of water.

Easements of Water, how acquired.

The origin of rights of this kind is referred either to express contract between the parties, or to a similar contract implied from the peculiar relation of the parties at the time they became possessed of their respective tenements, or from the long-continued exercise of the right from which a previous contract between them may be inferred ;² or to the provisions of an Act of the legislature.³

“A watercourse,” says Woolrych,⁴ “may be either a real or an incorporeal hereditament. If by grant, prescription, or otherwise, one should have an easement of this kind in the land of another person, it would partake of the latter quality ; but if the water flow over the party's own land, although, indeed, it cannot be claimed as water, yet it is, in effect, identified with the realty, because it passes over the soil, and *cujus est solum, ejus est usque ad cælum*.”

An easement is an incorporeal right.

The ceremony required by law for the creation of easements and all other incorporeal hereditaments, is a deed, devise, or record ; and as the same ceremonies are requisite in the transfer

By express agreement.

¹ The acquired rights of fishery and navigation are fully treated of elsewhere ; see Chaps. VI. and VII.

² Gale on Easements, p. 24.

³ Per Cockburn, C. J., in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 537 ; 40 L. J., Q. B. 293 ; 25 L. T. 239.

⁴ Woolrych, p. 146.

of a right as are requisite in its original formation, a water right as an incorporeal hereditament can only be assigned by deed, devise, or record.¹

An easement can only be created or assigned at law by deed.

This point was decided in *Hewlins v. Shippam*,² where the question was, whether a right to a drain running through the adjoining land could be conferred by a parol licence, and under the Statute of Frauds; and the Court held that such an interest could only be created by deed.

Bayley, J., in delivering the judgment of the Court, says: "A right of way or a right of passage for water (where it does not create an interest in land), is an incorporeal right, and stands on the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot), otherwise than by deed."³

After citing other cases⁴ in support of his opinion, the learned judge continues: "And in *Fentiman v. Smith*,⁵ where the plaintiff claimed to have passage for water by a tunnel over defendant's land, Lord Ellenborough lays it down distinctly—'The title 'to have the water flowing in the tunnel over defendant's land

¹ Angell on Watercourses, p. 324; Gale on easements, p. 25. An easement could not, until recently, be created by a grant under the Statute of Uses, but now the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41, s. 62), provides as follows:—

"(1) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, right, liberty or privilege in, or over or with respect to that land, or any part thereof, shall operate to vest in possession in that person, that easement, right, liberty, or privileges for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

"(2) This section applies only to conveyances made after the commencement of this Act."

"It is conceived that this section is intended to alter the mode of conveyance only, and does not authorise the creation of easements of a novel kind, such as easements in gross or not connected with the enjoyment of a tenement. By virtue of this section, an

"easement may now be reserved, or may be granted under a power.

"It should be noted that the Settled Land Act, 1882 (45 & 46 Vict. c. 88, s. 3 (1))—and cf. s. 24 (7)—empowers a tenant for life to 'sell the settled land or any easement, right, or privilege over or in relation to the same,' i.e., to subject the settled land to any such easement." See *Sutherland v. Sutherland*, L. R., 3 Ch. 169; see Gale on Easements, 7th ed., p. 71.

² 5 B. & C. 221; 31 R. R. 757; see as to this subject, Gale on Easements, pp. 35—95.

³ *Hewlins v. Shippam*, 5 B. & C. 221; 31 R. R. 757; see also *Fentiman v. Smith*, 4 East, 107; 7 R. R. 533; see also *Cyrker v. Payne*, 18 W. R. 436; *Cocker v. Cropper*, 1 C. M. & R. 418; 40 R. R. 626; *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 29 R. R. 449; Gale, pp. 29, 53.

⁴ Co. Litt. 9a, 42a, 169; 2 Roll. Abr. 62; Shep. Touch. 231; *Monk v. Butler*, Cro. Jac. 574; *Rumsey v. Rawson*, 1 Vent. 18—25; *Huskins v. Robins*, 1 Vent. 123—163; *Harrison v. Parker*, 6 East, 154; 8 R. R. 434.

⁵ 4 East, 107; 7 R. R. 533.

“ ‘could not pass by parol licence without deed.’ Upon these authorities, we are of opinion, that, although a parol licence might be an excuse for a trespass till such licence were countermanded, that a *right and title* to have passage for water, for a freehold interest, required a deed to create it; and that, as there has been no deed in this case, the present action, which is founded on a right and title, cannot be supported.”¹

The doctrine laid down in this case was fully recognized in *Cocker v. Couper*,² where an action was brought for stopping a watercourse. It appears from the award of the arbitrator that the channel in question consisted of a drain and tunnel which had been constructed in defendant's land by the plaintiff with the verbal consent of the then tenant and the defendant, and that the water had flowed through it up to the year 1833, when upon the plaintiff's refusal to pay for the use of the water the defendant diverted the channel. The Court of Exchequer were clearly of the opinion that the plaintiff was not entitled to recover. “With regard to the question of licence,” says the Court, “the case of *Hewlins v. Shippam* is decisive to show that an easement like this cannot be conferred unless by deed.” With regard to the effect of a licence, Mr. Phear³ thus expresses himself. “It is very important in considering the subject of easements to distinguish as early as possible between a *right*⁴ to do an act *in alieno solo* and a licence to commit an act of trespass. The *right* involves a certain continuing element, and has an incorporeal existence, whether any act be done under it or not: the possessor of the land over which it extends is, so far as it is capable of being exercised, deprived of an incident of territorial property, and the possessor of the right acquires by it, just to the same extent, an interest in the land itself. Whether the possessor of a right avails himself of it or not, he is entitled, while it continues, to treat it as something having an abstract existence, and to protect it from any infringement—i.e. from anything, the effect of which would be to prevent his free exercise of it when he chose. On the

¹ See also the remarks of the learned judge on the cases of *Winter v. Brockwell*, 8 East, 309; *Webb v. Paternoster*, Palm. 71; *Wood v. Lake*, Sayer, 3; and *Taylor v. Walters*, 7 Taunt. 374; 18 R. R. 499.

² 1 C. M. & R. 418; 40 R. R. 626; see also *Wood v. Leadbitter*, 13 M. & W. 838; *Wood v. Manley*, 11 A. & E. 30;

Bird v. Higginson, 6 A. & E. 824; *Perry v. Fitzhove*, 8 Q. B. 757; *Bryan v. Whistler*, 2 B. & C. 288; 32 R. R. 389; *Brown v. Windsor*, 1 Cr. & J. 20; *Wallis v. Harrison*, 4 M. & W. 538.

³ Phear's Rights of Water, p. 58.

⁴ See judgment of Bayley, J., in *Hewlins v. Shippam*, 5 B. & C. 232; 31 R. R. 757.

"other hand a licence¹ merely excuses the act when done, is retrospective and not prospective in its operation; it begets no obligation on the part of the licensor to keep it in force, and may, therefore, be revoked by him at any moment."

Equitable doctrine of acquiescence.

Where, however, the owner of a servient tenement has by express consent, or by such acquiescence as would make it a fraud to insist upon the legal right, induced others to incur expense in the execution of permanent works or the like, the High Court of Justice,² administering equity, will, in many cases, restrain him from the benefit of this rule. "The Court," says Lord Eldon,³ "will not permit a man knowingly, though passively, to encourage another to lay out money under an erroneous opinion of title (and the circumstance of looking on is in many cases as strong as using terms of encouragement) — a lessor knowing and permitting those acts which the lessee would not have done, and the other must conceive that he would not have done, but upon an expectation that the lessor would not have thrown any obstacle in the way of the enjoyment." Thus in *Duke of Devonshire v. Eglin*,⁴ where expense had been incurred in constructing a watercourse through defendant's lands, with his consent, but without any grant under seal, and after a user of nine years defendant attempted to interfere, he was restrained, upon terms, by perpetual injunction from interfering with the further user of the watercourse.⁵

So where a licence to take water which is essential to the enjoyment of property is acted upon, and expense incurred to the knowledge of the licensor, the Courts will grant relief. In *Bankart v. Tennant*,⁶ the defendant, being the owner of a canal of which plaintiffs were customers, gave the plaintiffs to understand that as long as they were customers they should have the use of the waste water of the canal for certain furnaces and smelting works which they had erected on the banks. James, V.-C., held that this did not give them any equitable right to the

¹ Brooke's Abridg. title "License"; Shep. Touch. 239; *Wood v. Leadbitter*, 13 M. & W. 842.

² See 36 & 37 Vict. c. 66, s. 24.

³ *Dunn v. Spurrier*, 7 Ves. 235; 6 R. R. 119; *Ramaden v. Dyson*, L. R., 1 H. L. 140; *Watercourse case*, 2 Eq. Abr. 522, pl. 3; *Short v. Tayler*, cited *ibid.*; *Powell v. Thomas*, 6 Hare, 300; *Laird v. Birkenhead*, 1 John. 500; *Duke of Beaufort v. Patrick*, 17 Beav. 60; *Williams v. Earl of Jersey*, 1 Cr.

& Ph. 91; *Somerset Canal v. Harcourt*, 24 Beav. 271; *Rochdale Canal v. King*, 2 Sim., N. S. 28; *Cutching v. Bassett*, 32 Beav. 101.

⁴ 14 Beav. 530. As to what acquiescence is not sufficient, see *Blanchard v. Bridges*, 4 A. & E. 194; 53 R. R. 26; *Bankart v. Houghton*, 27 Beav. 425; *Bankart v. Tennant*, L. R., 10 Eq. 141; 39 L. J., Ch. 809; 23 L. T. 137.

⁵ See *Owen v. Davies*, W. N. (1874), 175.

⁶ L. R., 10 Eq. 141.

water; though he said that if it had been made out to his satisfaction that the water was essential, or anything like essential, to the enjoyment of the plaintiffs' property, he should have found his way of giving them the relief they asked. He cited in his judgment what Lord Loughborough says in *Clavering's case*:¹ "There was a case (I do not know whether it came to a decree) against Mr. George Clavering, in which some person was carrying on the project of a colliery, and had sunk a shaft at a considerable expense. Mr. Clavering saw the thing going on; and in the execution of that plan it was very clear the colliery was not worth a farthing without a road over his ground; and when the work was begun he said he would not give the road. The end of it was that he was made sensible—I do not know whether by decree or not—and that he was made to give the road at a fair value."²

"Notwithstanding this provision," says the editor of Gale, "the distinction between law and equity must still be regarded. If a legal estate in an easement is granted by deed, the consideration is immaterial. A claim for damages may be founded for breach of an agreement to grant an easement, if there is any consideration for the agreement; but to claim an equitable estate in an easement by agreement not under seal, there must be a substantial consideration at least equal in value to the easement claimed, according to the maxim 'Equity is equality.'"

A parol licence has, moreover, been held to be sufficient to extinguish an existing easement, as where permission is given to a man to erect something on his own land which is incompatible with the continuance of some easement over it. Thus, in *Liggins v. Inge*,³ it appeared that the predecessor of the plaintiff, who was entitled to a flow of water to his mill over defendant's land, by a parol licence authorized the defendants to cut down and lower a bank, and to erect a weir upon their own land, the effect of which was to divert into another channel the water which was requisite for the working of plaintiff's mill; subsequently the plaintiff complained to the defendants of the injurious effects of the weir, and called upon them to restore the bank to its ancient height, and to remove the weir; and upon

Parol licence may work the extinguishment of an easement.

¹ 5 Vesey, 690; 5 R. R. 146.

² *Davies v. Sear*, L. R., 7 Eq. 427; see also *Bankart v. Houghton*, 27 Beav. 425; *Blanchard v. Bridges*, 4 A. & E.

194; 53 R. R. 26; *Lady Stanley of Alderley v. Earl of Shrewsbury*, 10 W. N. 71.

³ 7 Bing. 693; 33 R. R. 615.

refusal on the part of the defendants to do this, an action was brought. The Court held, on the authority of *Winter v. Brockwell*,¹ and *Hewlins v. Shippam*,² that the licence was irrevocable. In the judgment of Bayley, J., in *Hewlins v. Shippam*,² the learned judge, in referring to the case of *Winter v. Brockwell*, says, "The case of *Winter v. Brockwell*, which was relied upon "on the part of the plaintiff, appears clearly distinguishable "from the present. All that the defendant there did, he did "upon his own land. He claimed no right or easement on the "plaintiff's. The plaintiff claimed a right or easement against "him, viz.:—the privilege of light and air through a parlour "window, and a free passage for the smells of an adjoining "house through the defendant's area; and the only point "decided was, that as the plaintiff had consented to the obstruction of such his easement, and had allowed the defendant to "incur expenses in making such obstruction, he could not "retract that consent without reimbursing the defendant that "expense. But that was not the case of the grant of an easement to be exercised on the grantor's land, but a permission to "the grantee to use his own land in a way in which, but for an "easement of the plaintiff's, such grantee would have had a "clear right to use it."

Such a licence, moreover, coupled with the absence of interference by the licensor with the execution of the works licensed, proves an intention to abandon the easement, which, if communicated to and acted on by the servient owner, is, of itself, sufficient in some cases to extinguish an easement.³

Construction
and effect of
express grant
of an easement.

An easement may be granted either separately and apart from the dominant tenement, or it may be included in the conveyance of it, by the use of such words as "all waters and watercourses "used, occupied, or enjoyed with the premises." Where the easement is granted *per se*, the precise words of the instrument itself must determine the extent of the right created.⁴ "I "think," says Jessel, M. R.,⁵ "that the true rule of construction

¹ 8 East, 308.

² 5 B. & C. 221; 31 R. R. 757, and *ante*, p. 206.

³ See Gale on Easements, pp. 26, 58; see also Angell on Watercourses, pp. 483—510, and American cases therein cited. See also *Wakeman v. West*, 8 Car. & P. 105; S. C. as to admissibility of an old map as evidence, 7 Car. & P. 479; 48 R. R. 802.

⁴ Gale, p. 70.

⁵ *Taylor v. St. Helens*, 6 Ch. D. 264; 46 L. J., Ch. 857; 37 L. T. 253; see also *Watts v. Kelson*, L. R., 6 Ch. 166; *Wardle v. Brocklehurst*, 1 E. & E. 1058; *Northam v. Hurley*, 1 E. & B. 665; 22 L. J., Q. B. 183; *Blatchford v. Mayor of Plymouth*, 3 Bing., N. C. 691; 43 R. R. 765; *Chadwick v. Marsden*, L. R., 2 Ex. 285.

“ is to construe the language of the instrument according to its
 “ ordinary meaning, giving to technical terms their technical
 “ meaning, unless we find a context such as to convince the mind
 “ that the ordinary rules of construction, which would be applied
 “ to the original expressions standing alone, ought not to be
 “ applied. . . . A grant of a watercourse in law, especially
 “ when coupled with other words, may mean any one of three
 “ things. It may mean the easement, or the right to the
 “ running of water; it may mean the channel pipe or drain
 “ which contains the water, and it may mean the land over
 “ which the water flows. Which it does mean must be shown
 “ by the context, and, if there is no context, I apprehend that it
 “ would not mean anything but the easement—a right to the
 “ flow of water.”¹

In the above case, a landowner granted to a company all the watercourses, dams, and reservoirs upon certain lands of his, which watercourses, &c., were laid down on an annexed plan, which was to be taken as part of the deed; and also the several streams and springs of water flowing into or feeding the said watercourses, &c., with right for the company solely to take and use the water from the said springs or streams of water, watercourses, &c., with powers to cleanse and repair, and with all other powers requisite for the enjoyment of the premises granted. The grantor was to be at liberty to use the waste or overflow water from the dams and reservoirs, but was not to exercise this power if the company resolved that it would be injurious to them. Certain portions of the watercourse noted on the plan might be enlarged to a certain extent. The watercourse, it appeared, was large enough to carry off all the water which flowed into it, except after heavy rain; but at one point there was a contraction of the channel, which, after heavy rain, backed up the water and caused a considerable overflow, of which overflow the grantor had the benefit for many years. The grantees, having occasion for more water, removed the obstruction, so as to allow the whole of the water which came into the watercourse during heavy rains to run down to their reservoir. The Court of Appeal held, that the grant was a grant of the artificial channel, of the definite springs and streams on the land, and of such water as should find its way into and run down the channel *as it stood*, and not a grant of all the waters on

*Taylor v.
St. Helens.*

¹ See per Bramwell, L. J., in *Brain v. Marfell*, 41 L. T., N. S. 457.

the land, and that the grantees had no right to alter the levels, or to enlarge the channel, so as to enable it to carry off all the water in times of heavy rains.¹

Chadwick v. Marsden.

In *Chadwick v. Marsden*,² the reservation of the free running of water and soil, coming from any other building and lands contiguous to the premises demised in and through the sewers and watercourses, made or to be made within, through, or under the said premises, was held to entitle the grantor to the passage of all water lawfully on his land, though it did not arise there, and to such products of the ordinary use of the land for habitation, such as night soil and sewage, but not to entitle him to send through the drain the offensive refuse of a manufactory.

Brain v. Marfell.

In *Brain v. Marfell*,³ the respondent, Marfell, conveyed to the appellant, Brain, a well or spring, and the sole right to the water therein and obtainable therefrom and the right and liberty to convey the said waste to his dwelling-house, and agreed that Brain, his heirs and assigns, should be for ever absolutely entitled to the said well or spring of water, and enjoy the same without interruption or disturbance by him, Marfell, or his heirs, assigns, or any other person or persons whomsoever. A railway company purchased from respondent lands in the proximity of the spring, without recourse to their compulsory powers. The works of the railway company drained the water from the land before it reached the spring, in consequence whereof the spring became dry, and no water flowed through the appellant's pipes. On an action for breach of agreement, the Court of Appeal held, affirming the judgment of Pollock, B., that the respondent had only conveyed the flow of the water after it had reached the spring, and that, therefore, the draining of the water before it reached the spring was no breach.

Rawstron v. Taylor.

In the case of *Rawstron v. Taylor*,⁴ it appeared that for twenty years and more water had flowed through an old drain on defendant's land, and along an ancient watercourse, and thence along a close of the defendant called G. B., and had thence contributed to supply plaintiff's mills after their erection in 1845. In that year defendant by deed conveyed to plaintiff the close G. B., together with all ways, watercourses, privileges, rights, members, and appurtenances to the same close belonging

¹ See also *Northam v. Hurley*, 1 E. & B. 665; 22 L. J., Q. B. 183. 1 H. & N. 916; 26 L. J., Ex. 258.

² L. R., 2 Ex. 285; 36 L. J., Ex. 177; 3 41 L. T., N. S. 455 (C. A.).

16 L. T. 666; see also *Pyer v. Carter*,

⁴ 11 Ex. 369; 25 L. J., Ex. 33.

or appertaining, subject to the proviso that it should be lawful for the defendant to use for any manufacturing, domestic or agricultural purposes, any water flowing from or through the contiguous lands of defendant unto and into the close of G. B., returning the surplus, or so much as remained, after being used for the aforesaid purposes, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. B. The defendant erected a lock-up tank upon his land, and caused the water which arose in his land near to the close G. B., and which had previously been accustomed to flow along the old drain and ancient watercourse into the close G. B.; and he caused the water to be conveyed from the tank to a lower part of his land to be used by his tenants. This water was used by them for the purposes mentioned in the proviso, but the surplus could not be returned to the close G. B. It was held, that by the deed the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso; and that by locking it up he had diverted it, and was liable to an action for breach of covenant by reason of such diversion.¹

In *Whitehead v. Parks*,² a grant of all streams of water that may be found in certain closes (when at the time of the grant there was but one stream and several wells), was held to include the underground water in the land, so as to prevent the grantor, or any one claiming under him, from doing anything, the effect of which would be to drain such underground water from the land. Pollock, C. B., says: "In the case of *Northam v. Hurley*, 'it was settled that where rights to water are created under 'a deed, the Court cannot take into consideration the rights 'which the parties would have had as riparian proprietors or 'otherwise; but the nature and extent of their interest must be 'regulated wholly by the deed.'"³

*Whitehead v.
Parks.*

In *Ewart v. Belfast Poor Law Guardians*,³ the Irish Vice-

¹ See *Northam v. Hurley*, 1 E. & B. 665.

² 2 H. & N. 870; 27 L. J., Ex. 169.

³ 9 L. R., Ir. 172 (C. A.). The full statement of this case is as follows: T., who was lessee for lives renewable for ever over a parcel of ground expressed in the original lease to be demised, "together with the free use of "all springs and streams of water arising "in or running through the demised premises," made two sub-leases to different

persons, for lives renewable for ever, of portions of the premises, the first sub-lease being made in 1851, and describing the premises therein comprised as "that "parcel of ground formerly used as a "bleach-green, together with the free use "of all waters running in or through the "demised premises, or any part thereof, "theretofore used for the purposes of "linen manufacture on the said lands, as "fully as T. was entitled thereto;" and the second being made in 1853 of the

Chancellor held, following *Whitehead v. Parks*, that where a tenement had been divided, the plaintiff who held one portion by a conveyance comprising "the full use of all water rising in or running through the demised premises," was entitled to an injunction to restrain the defendants, a sanitary authority and licensees of C., who held the other portion under conveyance from the same grantor, the *testatum* of which deed of conveyance made no mention of water rights, from making a cutting on the land of C. and so draining a spring of water on the plaintiff's land, on the ground that the conveyance to the plaintiff expressly granted him this water, and that, as the grantors could not derogate from their own grant,¹ neither C., who derived his title from those grantors, nor the defendants claiming through him, could lawfully deprive the plaintiff of the use of the water. But the Irish Court of Appeal (Lord O'Hagan, C., Palles, C. B.,

remaining portion of the lands, "together with the free use of all water, if any, arising in or running through the demised premises or any part thereof, as fully as T. was entitled thereto." The interest in both sub-leases, as well as the equity of redemption in the superior lease (which had been mortgaged), afterwards became vested in W., who was subsequently adjudicated a bankrupt, and the lands were sold by the Court of Bankruptcy. The plaintiff purchased the portion of lands comprised in the sub-lease of 1851; and one C., under whom the defendants claimed, became the purchaser of the portion included in the sub-lease of 1853. Both portions of land were set up for sale by auction on the same day—one of the conditions of sale providing that each would be sold "subject to existing easements," but the Court having refused the plaintiff's first tender, he subsequently increased it, and was not actually declared the purchaser until a few days after the confirmation of the sale to C. By deed of March 15th, 1876, made between the assignees of W. and certain other persons and the plaintiff, which recited (*inter alia*) the superior lease, the sub-lease of 1853, with the water rights thereby respectively granted, and the sub-lease of 1851, with the water rights thereby respectively granted, and the sub-lease of 1853, the grantors conveyed to the plaintiff the parcel of land formerly used as a bleach-green, together with the full use of all water rising in or running through the demised premises or any part thereof, therefore used for the purposes of linen manufacture as fully as T. was entitled

thereto under the recited superior lease or otherwise; and all other (if any) the premises comprised in the lease of 1850, excepting thereout and out of this grant the premises purchased by C. By deed of the 11th of April, 1876, made between the same grantors and C., and containing similar recitals to those in the conveyance to the plaintiff, the grantors conveyed to C. the lands comprised in the sub-lease of 1853. The *testatum* of this deed made no mention of water rights. The plaintiff's lands were at a lower level than the lands of C.; and in the plaintiff's lands, a few feet from the fence dividing them from C.'s lands, a copious stream of pure water issued from the ground. This water was peculiarly suitable for bleaching purposes; and the plaintiff, who was a bleacher, deposed that he intended to use it for bleaching; and at the time of action brought, it was used for domestic purposes in the dwelling-house on the plaintiff's grounds, and for the supply of a large mill thereon. The defendants, who were the local sanitary authority, entered into an agreement with C. to permit them to bore for water on his lands, and they made a cutting on them a few feet from the fence and obtained a large supply of water, whereupon the stream on the plaintiff's land ceased to flow. The plaintiff thereupon applied for an injunction to restrain the defendants from diverting and obstructing the water from his stream.

¹ As to this see *Birmingham and Dudley Bank v. Ross*, 38 Ch. D. 295; *Burrows v. Lane*, (1901) 2 Ch. 503.

and Deasy and Fitzgibbon, L. JJ.) reversed this decision, holding (a) that the conveyance to the plaintiff did not convey to him the right claimed, and that he would not have been entitled to it even if the conveyance to C. had contained an exception of all existing easements; and (b) that although the water flowed in a channel which was and by excavation could have been ascertained to be defined, as the channel was not known it must be treated as if it were percolating water and not the subject of property or capable of being granted.

Where a local Act of Parliament authorized a company to enter upon lands in a manor and search for any spring of water, and to convey the water from such spring into the town of South Shields, and it was provided that the company should not take water from any spring, streams or ponds, so as to deprive the occupiers of the land of water for their own necessary uses, but that the company might lay down pipes and the inhabitants might, with consent of the company, obtain water by pipes to communicate with the company's pipes at certain charges, according to the bore of the pipes; it was held that the owners and occupiers of lands within the manor were not prevented by the Act of Parliament from sinking wells in such lands, though the effect might be to draw off water from the company's springs.¹

South Shields Water Co. v. Cookson.

Upon a grant or covenant conferring an easement, the successive owners of the dominant estate, who, in the case of an ordinary covenant, would at common law be strangers to the contract, become entitled to the benefits of the rights conferred, and may sue for a violation of them.²

Benefits of the right to an easement runs with the land.

Thus in the case of *Cooke v. Chilcote*,³ where a purchaser of land with a well or spring on it covenanted with the vendor, who retained land adjoining, to erect a pump and reservoir, and to supply water from the well to all houses built on the vendor's land; it was held that both the benefit and burthen of the covenant ran with the land, and that consequently the plaintiff, who had purchased part of the land retained by the vendor, was entitled to an injunction to restrain the defendant, who had purchased the land of the original purchaser, from allowing the pump and reservoir to remain uncompleted. It was further

¹ *South Shields Water Co. v. Cookson*, 15 L. J., N. S., Ex. 315; see per Lord Eldon in *Blakemore v. Glamorgan*, 1 Myl. & K. 162; 36 R. R. 289, as to effect of local Acts of Parliament; see also

ante, pp. 188 *et seq.*

² Gale on Easements, p. 72.

³ 3 Ch. D. 694; 34 L. T. 207; see *Spencer's case*, 5 Rep. 16 a; 1 Smith's L. C. 60.

held, that even if the covenant did not run with the land, yet a sub-purchaser with notice of the covenant was bound by it.¹

In the case of *Athol v. The Midland Great Western Rail. Co.*,² a covenant by a lessor with a lessee, his heirs and assigns that it should be lawful for the lessee, his heirs and assigns during the continuance of the demise to make use of a conduit made for carrying off certain waste and superfluous water for their own use, was held to be a covenant running with the land.³

Not so rights unconnected with land.

The grant, however, of a right not appurtenant to land operates only as a personal licence, and is not assignable—it confers no right in the land to the grantee, but operates only as a contract between the grantor and the grantee. Thus where a canal company granted by deed the sole and exclusive right and liberty of putting pleasure boats on a canal, it was held that the grant did not create such an estate in the plaintiff as to enable him to maintain an action against a person who has disturbed his right. “It is not competent,” says Pollock, C. B., “to create rights unconnected with the use and enjoyment of lands and annex them to it, so as to constitute a property in the grantee. This grant may act as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right.”³

No particular words of grant necessary.

No particular words are necessary for a grant or covenant conveying an easement. Any words which clearly show the intention to give an easement which is by law grantable are sufficient to effect that purpose.⁴

Implied grant of an easement.

Where the dominant tenement itself is conveyed, it would seem that all rights which the conveying party enjoyed by virtue of, and as appendant to his estate, as against third parties, pass with it; and that if the dominant tenement be severed, each of the severed portions will retain the original right, provided no additional burden be thereby imposed on the servient tenement.⁵

¹ As to the effect of notice with regard to lights, see *Allen v. Lockham*, 11 Ch. Div. 790.

² Ir. R., 3 C. L. 353.

³ *Hill v. Tupper*, 2 H. & C. 121; see also remarks on the case by Bramwell, B., in *Nuttall v. Bracewell*, L. R., 2 Ex. 11; *Ackroyd v. Smith*, 10 C. B. 164.

⁴ *Roughtham v. Wilson*, 8 H. L. Cas. 362; *Holmes v. Seller*, 3 Lev. 305.

⁵ Gale, pp. 75, 77, 476; 11 H. 6, 22, p. 19; 2 Roll. Abr. 60, pl. 1; *Beaudely v. Brook*, Cro. Jac. 289; *Fentiman v. Smith*, 4 East, 107; 7 R. R. 533; *Canham v. Fisk*, 2 Cr. & J. 126; 37 R. R. 655; *Tyringham's case*, 4 Rep. 36 b; *Wyat Wild's case*, 8 Rep. 78 b; *Harris v. Drewe*, 2 B. & A. 164; 36 R. R. 527; *Codling v. Johnson*, 9 B. & C. 934; 33 R. R. 375.

Where there has been unity of ownership of the dominant and servient tenements, and where consequently all easements have been merged in the general rights of property, questions of difficulty arise, on the severance of the tenements, as to whether such easements or quasi-easements are created anew by the severance. After some difference of opinion, the law must be taken to be settled as follows :

On severance of tenements.

By the grant of the part of a tenement, there will pass to the grantee, by implication of law, 1st. All those easements over the other part of the tenement without which the enjoyment of the severed portion could not be had at all; and 2ndly. All those continuous¹ and apparent easements over the other part of the tenement which are necessary to the reasonable enjoyment of the part granted, and have been and are at the time of the grant² used by the owner of the entirety for the benefit of the part granted; but, as a general rule, there is no corresponding implication in favour of the grantor, except in such cases as ways of necessity, where the use of the part reserved could not be had at all without such implied reservation.³ A grantor, therefore, who wishes to reserve any easement over the part granted must use language to show that he intended to create the easement *de novo*.⁴

There is an implied grant of necessary easements to the grantee.

But no corresponding reservation in favour of grantor.

The proposition that where the dominant portion of the tenement is granted first, the grantee, as against the grantor and his successors, has by implied grant all those continuous and apparent easements over the other portion of the tenement necessary to the enjoyment of the part granted, has never been disputed, and was finally declared to be the law by the House of Lords in the case of *Ewart v. Cochrane*.⁵ In this case the respondent claimed a right to send the refuse of his tan-yard through a drain into a cesspool in the appellant's garden. Both tenements had belonged to one owner, who had sold the tan-yard to the respondent's predecessor without alluding in the

Ewart v. Cochrane.

¹ For definition of a "temporary" easement, see *Burrows v. Lang*, (1901) 2 Ch. 503.

² See *Watson v. Troughton*, 48 L. T. 508; 47 J. P. 518 (C. A.).

³ *Wheeldon v. Burrows*, 12 Ch. D. 31; *Barnes v. Loach*, 4 Q. B. D. 494; *Watts v. Kelson*, L. R., 6 Ch. 166; *Polden v. Bastard*, L. R., 1 Q. B. 156, 161; *Crossley v. Lightowler*, L. R., 2 Ch. 476; *Suffield v. Brown*, 12 W. R. 356; *Pyer v. Curter*, 1 H. & N. 916; *Nicholas v.*

Chamberlain, Cro. Jac. 121; *Pullan v. Roughfort Bleaching Co.*, 21 L. R., Ir. 73; *Gale on Easements*, pp. 96, 146.

⁴ *Barlow v. Rhodes*, 1 C., M. & R. 448; 38 R. R. 653, per Bayley, J.; *Worthington v. Gimson*, 29 L. J., Q. B. 116; 2 E. & E. 618; *Pearson v. Spencer*, 4 L. T., N. S. 769; *Pheysey v. Vicary*, 16 M. & W. 484; *Holland v. Deakin*, 7 L. J., O. S., K. B. 145.

⁵ 4 McQ. Scotch App., p. 117.

conveyance to the drain. He afterwards sold the garden to the appellant, who stopped the drain. In an action for the obstruction the House of Lords decided in favour of the respondent, on the following ground, stated by Lord Campbell, L. C. : " My Lords, I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of one part from the other, anything which was used and was necessary for the comfortable enjoyment of that part of the property which is granted shall be considered to follow from the grant if there are the usual words in the conveyance. I do not know whether the words are essentially necessary, but where there are the usual words, I cannot doubt that that is the law. In the case of *Pyer v. Carter* that is laid down as the law of England, which will apply to any drain or any other easement which is necessary for the enjoyment of the property. When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant."¹

With regard to the second proposition, namely, that there is no implied reservation of such easements other than ways of necessity and the like in favour of the grantor, there has been some conflict of authority.

*Nicholas v.
Chamberlain.*

In *Nicholas v. Chamberlain*,² it was held by the Court that if one erects a house and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the appurtenances, excepting the land, or sells the land to another reserving to himself the house, the conduit and pipes pass with the house, because it is necessary and *quasi* appendant thereunto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case requires. So it is if the lessee for years of a house and land erect a conduit upon the land, and after the term determines, the lessor occupies them together for a time, and afterwards sells the house with the appurtenances to one, and the land to another, the vendee shall have the conduit and the pipes and liberty to amend them. But by Popham, if the lessee erects such a conduit,

¹ *Ewart v. Cochrane*, 4 McQ. Scotch App. 117; see also *Hull v. Land*, 32

L. J., Ex. 113; 7 L. T. 692; 1 H. & C. 676.
² Cro. Jac. 121.

and afterwards the lessor, during the lease, sells the house to one, and the land wherein the conduit is, to another, after the lease determines, he who hath the land wherein the conduit is, may disturb the other in the using thereof, and may break it, because it was not erected by one who had a permanent estate or inheritance. So it is if a disseisor of a house and land erects such a conduit, and the disseisee re-enter, not taking consuance of any such erection, nor using it, but presently after his re-entry sells the house to one, and the land to another, he who hath the land is not compellable to suffer the other to enjoy the conduit; but in the principal case, by reason of the misleading therein, there was not any judgment given.

In *Sury v. Pigott*,¹ Doddridge, J., says, "A man having a mill and a watercourse over his land, sells a portion of the land over which the watercourse runs; in such a case by necessity the watercourse remaineth to the vendor, and the vendee cannot stop it."

In the case of *Pyer v. Carter*,² the defendant's house adjoined the plaintiff's, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to plaintiff. At the time of the conveyance the drain existed running under plaintiff's house, and then under defendant's, and discharging itself into the common sewer; water from the eaves of defendant's house fell on plaintiff's, and then ran into the drain on plaintiff's premises, and thence through the defendant's premises into the common sewer. The plaintiff's house was drained through the same drain. It was proved that plaintiff might have made a drain direct from his house into the common sewer, and it was not proved that the defendant when he purchased knew of the position of the drain. It was laid down by the Court that where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to the benefit

*Pyer v.
Carter.*

¹ Palmer, 444; Lopham, 166; 3 Bulstrode, 339; Noy, 84; Latch, 153; W. Jones, 145. As to other cases of necessary easements, see *Cox v. Mathews*, 1 Vent. 237; *Palmer v. Fletcher*, Lev. 122; *Richards v. Rose*, 9 Ex. 220; *Murchie v. Black*, 19 C. B., N. S. 190; *Swansborough v. Coventry*, 9 Bing. 305; 35 R. R. 660; *Riviere v. Bower*, Ry. & Moo. 24; 27 R. R. 726; *Compton v.*

Richards, 1 Price, 27; 15 R. R. 682; *Glare v. Harding*, 27 L. J., Ex. 392, per Bramwell, B.; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 766, Ex. Ch.; *Tyringham's case*, 4 Rep. 38; *Hertz v. Union Bank*, 2 Giff. 286; *White v. Bass*, 7 H. & N. 722; *Dodd v. Burchell*, 1 H. & C. 113; Gale, pp. 151—163.

² 1 H. & N. 916; Gale, p. 139.

of all drains from that house, and subject to all the drains then necessarily used for the enjoyment of the adjoining house, and that without any express reservation or grant, inasmuch as the purchaser takes the house as it is: and that the question as to what is "*necessarily used*" depends upon the state of things at the time of the conveyance, and as matters then stood without alteration; and upon the argument urged that this was not an *apparent* and continuous easement, the Court said, that although the defendant did not know of the existence of the drain at the time of the conveyance to him, yet as he must or ought to have known that there was some drainage for the waters he ought to have inquired, and that those things must be considered *apparent* which would be so upon a careful inspection by a person conversant with such matters.

*Suffield v.
Brown.*

The doctrines laid down in *Pyer v. Carter* have been strongly dissented from in two cases in the Court of Chancery. The first, that of *Suffield v. Brown*,¹ was a case of a dock and wharf owned by the same party, where the bowsprits of vessels in the dock had to project over the corner of the wharf in order to enter the dock if they were of any considerable size. The wharf was sold to one without any reservation of the right claimed, and the dock to another. The Master of the Rolls, Lord Romilly, held that the right to project the bowsprits was necessary to the enjoyment of the dock, and was, therefore, impliedly granted by the conveyance. On appeal, Lord Chancellor Westbury reversed this decision of the Master of the Rolls: "Where," he says, "the owner of two adjoining "properties makes an absolute grant of one of them without "reservation, neither he nor those claiming under him can "derogate from that grant by claiming over the property so "granted an easement in respect of the other property, the "user of which existed during the unity of ownership." In the course of his judgment he criticises Gale on Easements, ch. 4, and says, "If nothing more be intended by this passage "than to state that, on the grant by the owner of an entire "heritage of part of that heritage as it is then used and enjoyed "there will pass to the grantee all those continuous and "apparent easements which have been and are at the time "of the grant used by the owners of the entirety for the benefit "of the parcel granted, there can be little doubt of its correct-

¹ 33 L. J., Ch. 249; 9 L. T. 627; 12 W. R. 356.

"ness; but it seems clear that the learned writer uses the word "grant" in the sense of reservation and mutual grant, and intends to state that where the owner of the entirety sells and grants a part of it in the fullest manner, there will still be reserved to such owner all such continuous, apparent, or necessary easements out of or upon the thing granted as have been used by the owner for the benefit of the unsold property during the unity of possession. This is clearly shown by what is subsequently laid down, that it is immaterial which of the two tenements is first granted, whether it be the *quasi* servient or the *quasi* dominant. But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him, the grantor." His Lordship goes on to disapprove of *Pyer v. Carter*, and says, "I cannot look upon that case as rightly decided, and must wholly refuse to accept it as any authority."

In *Crossley v. Lightowler*¹ it was held, that on the conveyance of riparian land the grantee is entitled as against the grantor to a flow of pure water past the land granted, and that the grantor cannot, in the absence of any express reservation to that effect, justify fouling the water, although he may have done so from the drainage of a manufactory existing before and at the time of the grant; and Lord Chelmsford, L. C., in giving judgment, approves of Lord Westbury's dicta in *Suffield v. Brown*, and adds: "It appears to me to be an immaterial circumstance that the easement should be apparent and continuous. For *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation; and yet the law will not reserve anything out of a grant in favour of a grantor except in case of necessity."

*Crossley v.
Lightowler.*

In the case of *Watts v. Kelson*,² in 1860 the owner of two properties, A. and B., made a drain from a tank on property B. to some cattle sheds on property A., for the purpose of supplying them with water, and they were so supplied until 1863, when the owner sold property A. to the plaintiff, "with all waters, water-

*Watts v.
Kelson.*

¹ L. R., 2 Ch. 478; 36 L. J., Ch. 584; 16 L. T. 638.

² L. R., 6 Ch. 166; 40 L. J., Ch. 126; 24 L. T. 209; *Wardle v. Brocklehurst*,

1 E. & E. 1058; 29 L. J., Q. B. 145; 1 L. T. 579; and see also cases cited by Gale; 1 p. 110 *et seq.*

"courses, &c., to the same hereditaments and premises belonging "or appertaining, or with the same or any part thereof held, "enjoyed, or reputed as part thereof or as appurtenant thereto;" and the plaintiff had the use of the water as above until defendant, a subsequent purchaser of property B., stopped it; it was held that the watercourse was a continuous easement necessary to the use of property A. and would have passed by implication without any words of grant; and further, that supposing the use of the water were only convenient and not necessary, the general words of the grant were sufficient to pass it. It was held, moreover, in this case, that the right claimed being a right to have the accustomed flow of water through the pipes without regard to the purpose for which plaintiff used it, the right was not lost by his using the water for cottages erected on the side of the cattle sheds. In the course of the argument, Mellish, L. J., says: "I think the order of the two conveyances in point of "date is immaterial, and that *Pyer v. Carter*,¹ is good sense and "good law. Most of the common law judges have not approved "of Lord Westbury's observations on it." James, L. J.: "I "also am satisfied with the decision in *Pyer v. Carter*."¹

*Wheeldon v.
Burrows.*

In the case of *Wheeldon v. Burrows*,² a vendor conveyed a plot of land, part of his property, to A., without any reservation of the easement of access of light, and subsequently another adjoining plot, part of the property retained, to B. Bacon, V.-C., held that the easement, though apparent and continuous, was not of necessity, and consequently there was no implied reservation of it by the vendor out of his conveyance to A.

On appeal, the Court of Appeal,³ consisting of James, Baggallay, and Thesiger, L. JJ., upheld the decision of the Vice-Chancellor; and Thesiger, L. J., delivering the judgment of the Court, discusses in an elaborate judgment the previous cases, and lays down the law as follows: "We have had," says the Lord Justice, "a considerable number of cases cited to us, and out "of them I think that two propositions may be stated as "what I may call the general rules governing cases of this "kind. The first of these rules is, that on the grant by the "owner of a tenement of part of that tenement as it is "then used and enjoyed, there will pass to the grantee all those

¹ 1 H. & N. 916.

² 12 Ch. Div. 31; 48 L. J., Ch. 853; 41 L. T. 327; 27 W. R. 165; see *Ellis v. Manchester Carriage Co.*, 2 C. P. D.

13: *Russell v. Harford*, L. R., 2 Eq. 507; *Curriers' Co. v. Corbett*, 11 Jur., N. S. 719.

³ 12 Ch. Div. 48.

“continuous and apparent easements (by which of course, I mean “*quasi* easements), or, in other words, all those easements which “are necessary to the reasonable enjoyment of the property “granted, and which have been, and are at the time of the “grant, used by the owners of the entirety for the benefit of the “part granted. The second proposition is that, if the grantor “intends to reserve any right over the tenement granted, it is “his duty to reserve it expressly in the grant. Those are the “general rules governing cases of this kind, but the second of “those rules is subject to certain exceptions. One of those “exceptions is the well-known exception which attaches to cases “of what are called ways of necessity; and I do not dispute for a “moment that there may be, and probably are, certain other “exceptions, to which I shall refer before I close my observations “upon this case. Both of the general rules which I have mentioned are founded upon a maxim which is as well established “by authority as it is consonant to reason and common sense, viz., “that a grantor shall not derogate from his grant. It has been “argued before us, that there is no distinction between what has “been called an implied grant and what is attempted to be “established under the name of an implied reservation, and that “such a distinction between the implied grant and the implied “reservation is a mere modern invention, and one which runs “contrary, not only to the general practice upon which land “has been bought and sold for a considerable time, but also to “authorities which are said to be clear and distinct upon the “matter. So far, however, from that distinction being one “which was laid down for the first time by, and which is to be “attributed to Lord Westbury in *Suffield v. Brown*,¹ it appears to me that it has existed almost as far back as we can trace the “law upon the subject; and I think it right, as the case is one of “considerable importance, not merely as regards the parties, but “as regards vendors and purchasers of land generally, that I “should go with some little particularity into what I may term “the leading cases upon the subject.” His Lordship then goes on to cite *Palmer v. Fletcher*,² *Nicholas v. Chamberlain*,³ *Tenant v. Goldwin*,⁴ *Swansborough v. Coventry*,⁵ *Cox v. Mathews*,⁶ and *Compton v. Richards*,⁷ as authorities for the principles of law

¹ 4 De J. & S. 185.

² 1 Lev. 122.

³ Cro. Jac. 121.

⁴ 2 Ld. Raym. 1089, 1093.

⁵ 9 Bing. 305; 35 R. R. 660.

⁶ 1 Vent. 237.

⁷ 1 Price, 27; 15 R. R. 682.

stated at the beginning of his judgment, and continues: "I now come to *Pyer v. Carter*,¹ which seems to break the hitherto unbroken current of authority upon this point, and there can be no doubt that Sir Henry Jackson is justified in saying, that if that case is right, this appeal ought to be allowed. That was a case of a somewhat special character. A house was conveyed to the defendant by a person who was the owner of that house, and also of the house which was subsequently conveyed to the plaintiff; and there had been, during the unity of the ownership, the enjoyment of the easement of a spout which extended from the defendant's premises over the plaintiff's premises, and by which water was conveyed on to the latter. But it is material to observe that the water, when it came on to what was subsequently the plaintiff's premises, was conveyed into a drain on the plaintiff's premises, which drain passed through the defendant's premises, and in that way went out into the common sewer. Subsequently, the house over which this easement existed was conveyed to the plaintiff, and upon an obstruction of the drains in the defendant's house, which, be it observed, immediately caused a flooding of the plaintiff's house by the very water coming from the defendant's house, the plaintiff brought his action; and it was held there that the plaintiff was entitled to maintain his action, and that upon the original conveyance to the defendant, there was a reservation to the grantor of the right to carry away this water which came from the defendant's premises by the medium of the drain, which also went through his premises. Though those circumstances were special in their character, there is no doubt that the principles laid down by the Court of Exchequer were as wide as possibly could be. The Court laid down that there was no distinction between implied reservation and implied grant; and this, as it appears to me, broke the hitherto unbroken current of authority upon this subject."

His Lordship then states that the principles of law laid down in *Pyer v. Carter* were distinctly overruled in *White v. Bass*,² and cites with approval the judgment of Lord Westbury in *Suffield v. Brown* as stated on a former page.³ "But," he continues, "*Suffield v. Brown*³ has been confirmed by an equally high authority, for, in *Crossley and Sons v. Lightowler*,⁴ Lord

¹ 1 H. & N. 916.

² 7 H. & N. 722.

³ 4 De J. & S. 185, *ante*, pp. 220 *et seq.*

⁴ L. R., 2 Ch. 478.

“Chelmsford as Lord Chancellor had to deal with a similar question, and he there says: ‘Lord Westbury, however, in the case of *Suffield v. Brown*, refused to accept the case of *Pyer v. Carter*,¹ as an authority, and said: ‘It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation.’ I entirely agree with this view. It appears to me to be an immaterial circumstance that the easement should be apparent and continuous, for *non constat* that the grantor does not intend to relinquish it unless he shows the contrary by expressly reserving it. The argument of the defendants would make, in every case of this kind, an implied reservation by law; and yet the law will not reserve anything out of a grant in favour of a grantor, except in case of necessity.’ Now the only case in the Court of Appeal which is suggested as being contrary to this high authority of two Lord Chancellors is *Watts v. Kelson*,² and no doubt there are observations of Lord Justice Mellish to the effect that the order of conveyance in point of date is immaterial, that *Pyer v. Carter*³ is good sense and good law, and that most of the common law judges have not approved of Lord Westbury’s observations. But, putting aside for the moment that this was a mere *dictum* of the Lord Justice during the argument, I must observe that this is not exactly so, as in *White v. Bass*,⁴ the judges of the Court of Exchequer had distinctly, as regards the reasoning of *Pyer v. Carter*, overruled that case. No doubt, also, Lord Justice James says, ‘I am satisfied with the decision in *Pyer v. Carter*.’ But in the considered judgment of the Court, when, if it had been intended to say that *Suffield v. Brown*⁵ was not law, one would have thought there would have been something distinct upon the point, there is not one word to the effect of that which had been said by the Lords Justices during the argument. All that is said about it is this: Lord Justice Mellish, who delivered the judgment, after referring to *Nicholas v. Chamberlain*,⁶ said, ‘This case has

¹ 1 H. & N. 916.² L. R., 6 Ch. 166, 174.³ 1 H. & N. 916.⁴ 7 H. & N. 722.⁵ 4 De J. & S. 183.⁶ Cro. Jac. 121.

“ ‘always been cited with approval, and is identical not only in
 “ ‘principle, but in its actual facts, with the case now before us.
 “ ‘It was expressly approved of by Lord Westbury in *Suffield v.*
 “ ‘*Brown*,¹ where, though he objected to the decision in *Pyer v.*
 “ ‘*Carter*,² in which it was held that a right to an existent
 “ ‘continuous apparent easement was impliedly reserved in the
 “ ‘conveyance by the owner of two houses in the alleged servient
 “ ‘houses, yet he seems to agree that the right to such an easement
 “ ‘would pass by implied grant where the dominant tenement
 “ ‘is conveyed first ;’ and that is what the Court of Appeal had
 “ ‘to decide in *Watts v. Kelson*.³ Therefore *Watts v. Kelson* is
 “ ‘no authority to justify us in overruling *Suffield v. Brown*,—
 “ ‘still less for overruling it, supported as it is by the case of
 “ ‘*Crossley and Sons v. Lightowler*.⁴ Thus, then, as it appears to
 “ ‘me, stand the principal authorities on the general rules of law
 “ ‘which I stated at the commencement of this judgment.’ The
 Lord Justice then notices a number of other cases⁵ which were
 cited to illustrate the exceptions to the second general rule laid
 down by him at the commencement of his judgment—viz.,
 ways of necessity—and continues : “ These cases in no way
 “ support the proposition for which the appellant in this case
 “ contends ; but, on the contrary, support the propositions that
 “ in the case of a grant you may imply a grant of such continuous
 “ and apparent easements, or such easements as are necessary
 “ to the reasonable enjoyment of the property conveyed, and
 “ have, in fact, been enjoyed during the unity of ownership ; but
 “ that, with the exception which I have referred to of easements
 “ of necessity, you cannot imply a similar reservation in favour
 “ of the grantor of land. Upon the question whether there is
 “ any other exception, I must refer both to *Pyer v. Carter*⁶ and
 “ to *Richards v. Rose* ;⁷ and, although it is quite unnecessary for
 “ us to decide the point, it seems to me that there is a possible
 “ way in which these cases can be supported without in any way
 “ departing from the general maxims upon which we base our
 “ judgment in this case. I have already pointed to the special
 “ circumstances in *Pyer v. Carter*, and I cannot see that there is

¹ 4 De J. & S. 185.

² 1 H. & N. 916.

³ L. R., 6 Ch. 166.

⁴ L. R., 2 Ch. 478 ; 36 L. J., Ch. 584 ;
 16 L. T. 638.

⁵ *Pennington v. Galland*, 9 Ex. 1, 12 ;
Clark v. Cogge, Cro. Jac. 170 ; *Staple v.*

Haydon, 6 Mod. 1 ; *Chichester v. Leth-*
bridge, Willes, 72, n. ; *Dutton v. Tuglor*,
 Lutw. 1487 ; *Davies v. Sear*, L. R., 7 Eq.
 427, 431.

⁶ 1 H. & N. 916.

⁷ 9 Ex. 218.

“anything unreasonable in supposing that in such a case, where the defendant under his grant is to take this easement which had been enjoyed during the unity of ownership, of pouring his water upon the grantor’s land, he should also be held to take it, subject to the reciprocal and mutual easement by which that very same water was carried into the drain on that land, and then back through the land of the person from whose land the water came. It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied; and, although it is not necessary to decide the point, it seems to me worthy of consideration in any after case, if the question whether *Pyer v. Carter* is right or wrong comes for discussion, to consider that point. *Richards v. Rose*, although not identically open to exactly the same reasoning as would apply to *Pyer v. Carter*, still appears to me to be open to analogous reasoning. Two houses had existed for some time, each supporting the other. Is there anything unreasonable—is there not, on the contrary, something very reasonable—to suppose in that case that the man who takes a grant of the house first, and takes it with the right of support from that adjoining house, should also give to that adjoining house a reciprocal right of support from his own?” His Lordship concludes his judgment by referring again to the case of *Swansborough v. Coventry*,¹ and by holding that in the present case the fact that the two tenements, though not sold together, were put up at an auction together as part and parcel of one sale, could not affect the question.²

An easement exercised for the benefit of the dominant estate is not invalid merely because from the very nature of its exercise by the dominant estate it confers some benefit on other tenements.³

With regard to what words are necessary in a conveyance to pass an easement not necessary to the enjoyment of the tenement granted, it has been held that general words, such as “appertaining,” “belonging,” &c., are insufficient on the severance of tenements to pass such rights as ways, commons, &c.; but in

What words necessary to pass an easement not of necessity.

¹ 9 Bing. 305; 35 R. R. 660.

² As to this last point, see *Ewart v. Belfast Guardians*, ante, p. 213 and n. 3.

³ *Simpson v. Godmanchester Corporation*, (1897) A. C. 696; 66 L. J., Ch. 770; 77 L. T. 409, H. L. (E.) In this case the corporation of Godmanchester, as owners of certain lands, had for more than 200 years opened, as of right, the

gates of certain sluices or locks belonging to the appellant upon the river Ouse in time of floods or likelihood of flood in order to prevent damage to those lands, and it was held that the easement was good and was none the worse because the exercise of it also benefited lands belonging to other persons.

the case of *Wardle v. Brocklehurst* it was held that, by the grant of a farm with the usual words "with all watercourses used, "occupied, or enjoyed with the premises," the benefit of a culvert, and a stream of water running through the lands of the vendor to the farm granted, passed; and Lord Campbell says, "The land must be taken to be conveyed in the state in which "it then was, that is, we must take it that the culvert so bringing "down the water and all the watercourses are granted, not only "those which belong and appertain to the premises, but also "those which were used and enjoyed therewith." This judgment was affirmed in the Exchequer Chamber, and it was held that the defendant was entitled to use the water, not only for the farm which was sold to him, but for a manufactory which he possessed beyond.¹ In *Pullan v. Roughfort Bleaching Co.*,² lands, on which were certain dams and artificial watercourses leading therefrom, and which were held under leases containing reservations of all mills, mill-seats, dams, dam-seats, water, and watercourses, and all convenient ways to and from the same, were ordered to be sold in an administration suit. They were accordingly put up for sale by auction in four lots, the particulars and conditions of sale, which set out the reservations in detail, stating that each lot would be sold subject to all rights and easements legally existing. The sale by auction proved abortive. The plaintiff subsequently tendered for lot 4. His offer was accepted, and his lot was conveyed to him "excepting and "reserving all such matters and things as are excepted and "reserved in and by the said recited indenture of lease," and also subject to all such rights and easements as then existed or affected the premises. After the acceptance of the plaintiff's offer, and before the conveyance to him, H. made a tender for lot 3, which was accepted; and this lot was by deed, subsequent to the plaintiff's conveyance, assigned to him with similar exceptions, reservations, &c. H. assigned his interests to the defendants. Prior to, and at the time of, the plaintiff's proposal and conveyance, some of the artificial watercourses flowed from lot 3 to lot 4, and the water thereof was utilized for certain purposes on this lot. The lessor had never interfered or expressed any intention of interfering with the plaintiff's user or enjoyment of these water-

¹ 1 E. & E. 1058; 29 L. J., Q. B. 145; 1 L. T. 579. See also *Watts v. Kelson*, L. R., 6 Ch. 175.

² 21 L. R., Ir. 73; see also *Hall v. Laird*, 32 L. J., Ex. 113; 7 L. T. 692; 1 H. & C. 676.

courses. The defendants obstructed the water flowing therein:—The Court *held*, that the plaintiff was entitled to a declaration as between him and the defendants of a right to the usual and accustomed flow of water, and to an injunction to restrain the defendants from obstructing the same, and that mere possession of rights, corporeal or incorporeal, is sufficient to maintain an action for disturbance of them against a wrongdoer.

It should be here noticed that the maxim of law is, that who-soever grants a thing, is supposed also tacitly to grant that without which the grant would be of no effect;¹ and that consequently, upon the grant of an easement, all such secondary easements as are essential for its full enjoyment will pass also without further words of grant.² Thus, where there is an easement of watercourse over another's land, there is an implied right of going on that land to clear and repair it, and, where there is a right of drawing water, this includes the right of going and returning over the servient owner's land.³ In executing works necessary for the enjoyment of the easement, nothing of course must be done to alter the accustomed mode of enjoyment in such a manner as to impose a greater burden on the servient tenement. Such secondary easements, forming in most cases one entire right with the principal easement, cease also on its extinction.⁴

Secondary easements.

As every easement is a restriction upon the rights of property of the owner of the servient tenement, no alteration can be made in the mode of enjoyment by the owner of the dominant heritage, the effect of which will be to increase such restriction. Supposing no grant to exist, the right must be limited by the amount of enjoyment proved to have been had;⁵ but a mere alteration in the mode of enjoyment, whereby no injury is caused to the servient heritage, will not destroy the right.⁶

No alteration can be made in an easement increasing the restriction.

The existence⁷ of the evidence necessary to prove an actual grant of a special right to a watercourse, may be inferred from a

By prescription.

¹ 11. Rep. 52; Angell, p. 278.

² See Gale, p. 549.

³ *Goodhart v. Hyett*, 25 Ch. D. 182; 53 L. J., Ch. 219; 50 L. T. 95; *Brown v. Best*, 1 Wils. 174; Bracton, lib. 4, ff. 232 a, 233 a; *Nicholas v. Chamberlain*, Cro. Jac. 121; *Hinchcliffe v. Earl of Kinnoul*, 5 Bing., N. C. 1; 50 R. R. 579; see also *Pyer v. Carter*, 1 H. & N. 916; *Pearson v. Spencer*, 3 B. & S. 761; *Dodd v. Burchell*, 1 H. & C.

113; and American cases in Angell, ch. 5.

⁴ Civil Law, L. 17, ff. quemad. serv. amit.; *Peter v. Daniel*, 5 C. B. 563; *Beeton v. Weate*, 5 E. & E. 986.

⁵ See *Cawkwell v. Russell*, 26 L. J., Ex. 34, and *post*, p. 254.

⁶ *Luttrell's case*, 4 Rep. 86; *Hall v. Swift*, 6 Scott, 167; 4 Bing., N. C. 381; 44 R. R. 723; and *post*, pp. 242, 247.

⁷ Angell on Watercourses, p. 351

long use and enjoyment without interruption. It is laid down in Bracton,¹ that all incorporeal rights or services may be acquired by acquiescence and use, and lost by neglect and disuse. Indeed, all the writers upon the common law of England, as well as the civilians, have recognized the principle, that a right to any incorporeal hereditament may be acquired by lapse of time. It is the duty of the Court when they find an uninterrupted and immemorial user to find if possible a legal origin for it,² but the circumstances of the enjoyment must be carefully looked to.³ Where an onerous liability has been asserted and submitted to for a long series of years, although the evidence begins well within modern times, anything not manifestly absurd which will support and give a legal origin to such a custom will be presumed to have a legal origin.⁴ This mode of acquisition has been by writers both on the common and civil law denominated prescription, which they say is founded on usage—*longa, continua, et pacifica*. They also state that every prescription supposes a grant once made and afterwards lost; and that, therefore, nothing can be claimed by prescription⁵ which in its nature could not have been granted.

Prescription
at common
law.

Prescription may be defined as “a title acquired by possession “had during the time and in the manner fixed by law.”⁶ By common law an enjoyment to confer a title to an easement must have continued during a period co-extensive with the memory of man, or, in legal phrase, “during time whereof the memory of “man runneth not to the contrary.” “The time of memory,” says Blackstone, “has long ago been used and ascertained by the “law to commence from the reign of Ric. I.” The extreme difficulty of giving proof of enjoyment for so long a period was lessened by its being held that evidence of enjoyment, during a shorter time, raised a presumption that such enjoyment had existed for the necessary period. Where, however, the actual origin of the enjoyment was shown to have been of more recent date than the prescription, the right in earlier cases was held to be defeated.⁷

¹ Lib. 4, xxxviii., sect. 3.

² *Goodman v. Saltash Corporation*, 7 App. Cas. 633; *A.-G. v. Wright*, (1897) 2 Q. B. 318.

³ *Tilbury v. Silva*, 45 Ch. Div. 98; 62 L. T. 254.

⁴ *L. & N. W. Ry. v. Fobbing Level Commissioners*, (1896) 66 L. J., Q. B. 127; 25 L. T. 629.

⁵ *Carlyon v. Lovering*, 1 H. & N. 784; 26 L. J., Ex. 251; *Rochdale Co. v. Radcliffe*, 18 Q. B. 287; see also *Irimy v.*

Stocker, L. R., 1 Ch. 396; 35 L. J., Ch. 467; 14 L. T. 427.

⁶ Gale, 164; Co. Litt. 113 b; see also the judgment of Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 100, where an elaborate history of the origin of the doctrine of prescription is given; and same case on appeal, 4 Q. B. D. 462.

⁷ Gale, p. 167; see *Jenkins v. Harrey*, 1 Cr., M. & R. 894; 40 R. R. 769; *Bury v. Pope*, Cro. Eliz. 118.

To obviate the inconvenience, which must have arisen from allowing long enjoyment to be defeated merely by showing that the origin of the right was subsequent to the reign of Ric. I., the Courts introduced a new title by the presumption of a grant made and lost in modern times.¹ According to this doctrine, from evidence of enjoyment of from twenty to sixty years,² a jury were at liberty to presume a grant of the right claimed, although the origin of the right was shown to be more recent than the time of legal memory.³ Such a presumption might be rebutted;⁴ but on the recommendation of a judge that the evidence warranted the presumption of a grant, a jury were bound to find that such had existed.⁵

The statute 2 & 3 Will. IV. c. 71, commonly called the Prescription Act, was intended further to accomplish this object, by shortening, in effect, the period of prescription, and making that possession a bar or title of itself, which was so before only by the intervention of a jury.⁶

The provisions of this Act, so far as they relate to the easement of watercourse, are as follows:—By sect. 2, it is enacted, “That
“no claim which may be lawfully made at the common law, by
“custom, prescription, or grant, to any way or other easement,
“or to any watercourse,⁷ or the use of any water,⁸ to be enjoyed
“or derived upon, over, or from any land or water of our said

¹ Gale, p. 170.

² See *Rolle v. Whyte*, L. R., 3 Q. B. 303; *Deuohirst v. Wrigley*, C. P. Coop. 329; *Baily v. Clark*, (1901) 17 T. L. R. 239; (1902) 18 T. L. R. 364, C. A.

³ *Keymer v. Summers*, cited in *Read v. Brookman*, 3 T. R. 157; Bull. N. P. 74; *Campbell v. Wilson*, 3 East, 294; 7 R. R. 462; see also *Mayor of Hull v. Horner*, Cowp. 102; *Eldridge v. Nott*, ibid. 214; *Lady Dartmouth v. Roberts*, 16 East, 334; *Holcroft v. Keel*, 1 Bos. & Pul. 400; 35 R. R. 683; *Lorett v. Wilson*, 3 Bing. 115; *Codling v. Johnson*, 9 B. & C. 933; 33 R. R. 375; see per Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 100.

⁴ See per Cockburn, C. J., in *Angus v. Dalton*, 3 Q. B. D. 100.

⁵ Per Alderson, B., in *Jenkins v. Hurrey*, 1 C., M. & R. 895; 40 R. R. 769; per Parke, B., in *Bright v. Walker*, 1 C., M. & R. 217; 40 R. R. 536; see also *Finch v. Resbridge*, 2 Vern. 390.

⁶ *Bright v. Walker*, 1 C., M. & R. 217, per Parke, B.; 40 R. R. 536.

⁷ A claim to adulterate the water of a natural stream is a claim to a water-

course within this section: *Wright v. Williams*, 1 M. & W. 77; *Carlton v. Loring*, 1 H. & N. 797; 35 L. J., Ch. 467; 14 L. T. 427.

⁸ A claim of right to go on any man's close, and take water from a spring there, is an easement: *Huce v. Ward*, 4 E. & B. 702; *Manning v. Waddale*, 5 A. & E. 764; 44 R. R. 576; *Constable v. Nicholson*, 14 C. B., N. S. 230. A right to keep an opening from an ancient ditch into a stream closed, can be established by twenty years' uninterrupted user: *Drewitt v. Sheard*, 7 C. & P. 465; 48 R. R. 797. A claim to have water diverted, which would otherwise have come to plaintiffs' land, is a claim to a watercourse under 2 & 3 Will. IV. c. 71: *Mason v. Shrewsbury Rail. Co.*, L. R., 6 Q. B. 578. A claim to the waste water allowed to pass from a canal is not a claim to a watercourse under the Prescription Act: *Staffordshire Canal v. Birmingham*, L. R., 1 H. L. 254. A claim to a weir in a non-navigable river is within the Act: *Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657.

"Lord the King, his heirs or successors, or being parcel of the
 "Duchy of Lancaster, or of the Duchy of Cornwall, or being the
 "property of any ecclesiastical or lay person, or body corporate,
 "when such way or other matter as herein last before mentioned
 "shall have been actually enjoyed by any person claiming right¹
 "thereto, without interruption for the full period of twenty years,
 "shall be defeated or destroyed by showing only that such way
 "or other matter was first enjoyed at any time prior to such
 "period of twenty years; but nevertheless, such claim may be
 "defeated in any other way by which the same is now liable to
 "be defeated;² and where such way or other matter as herein
 "last before mentioned shall have been so enjoyed as aforesaid
 "for the full period of forty years,³ the right thereto shall be
 "deemed absolute and indefeasible, unless it shall appear that
 "the same was enjoyed by some consent or agreement expressly
 "given or made for that purpose by deed or writing."

By sect. 4, it is provided, that each of the respective periods before mentioned are to be deemed and taken to be the period next before some suit or action in which the right is disputed,⁴

¹ See *Tickle v. Brown*, 4 A. & E. 369; 43 R. R. 358.

² As to this, see Gale on Easements, pp. 180—190.

³ In *Mason v. Shrewsbury Railway* (L. R., 6 Q. B. 578), a canal company before 1800, under powers of an Act of Parliament, diverted to the canal a great part of the water of a brook which flowed through plaintiff's land. The rest of the water continued to flow as before. In 1847, defendants, under an Act of Parliament, bought and discontinued the canal. In 1864, defendants restored, by means of a cut, the water which had been diverted to the brook. In 1865 they sold the part of the canal on which was the cut. The bed of the brook, owing to the diminished scour from 1800 to 1853, had become silted up so as not to be sufficient to carry off the water in extraordinary floods. In 1866, such a flood occurred, and damaged plaintiff's lands. The Court held, that there being no obligation imposed on the canal company to continue the diversion of the water, plaintiff had no right of action. By Blackburn and Hannen, JJ., on the ground that, though the claim to have the water diverted was a claim to a watercourse under the Prescription Act, yet the enjoyment was not of right, and therefore, though of more than forty years, it conferred no right on the plain-

tiff. By Cockburn, C. J., on the ground that plaintiff, the owner of the servient tenement, could acquire no right against the owner of the dominant tenement. See also *National Manure Co. v. Donald*, 4 H. & N. 8.

⁴ Where the continuance of a wrongful act causes fresh damage, the continuance of the wrongful act which caused the damage constitutes a fresh cause of action.

The defendants, in 1866, wrongfully obstructed a stream flowing by the plaintiff's lands, and continued the obstruction down to 1873, when it caused the flooding of his lands. *Held* (affirming the decision of the Common Pleas, but on a different ground), that the continuance of the wrongful obstruction causing fresh damage in 1873 constituted a fresh cause of action in 1873; and that, therefore, the Statute of Limitation applicable to the case began to run from the time of the damage in 1873. The plaintiff relied upon the obstruction of the stream as the cause of action. *Held*, that, having regard to sect. 81 of the Common Law Procedure Act, 1853, it was open to the plaintiff to rely upon the continuance of the obstruction as the cause of action. *Derby v. Grand Canal Co.*, Ir. R., 9 C. L. 194; Ir. R., 8 C. L. 511, following *Whitehouse v. Fellowes*, 10 C. B., N. S. 765.

and that no act is to be deemed an interruption, unless the same shall have been submitted to or acquiesced in for one year after notice given.

Sect. 5 provides that, in pleading, it shall be sufficient to claim the enjoyment as of right.

Sect. 6 provides that no presumption shall be allowed in favour of any claim, upon proof of enjoyment for less than the number of years provided by the Act.¹

Sect. 7 provides that the time during which any person otherwise capable of resisting any claim, shall be infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action shall have been diligently prosecuted, until abated by the death of the party or parties, shall be excluded from the computation of the periods hereinbefore mentioned, except in cases where the right or claim is hereby declared to be absolute and indefeasible.

By sect. 8, it is provided, that where any land or water, upon, over, or from which any such way or convenient watercourse or use of water shall have been or shall be enjoyed, is held for life or any term beyond three years, the time of the enjoyment of any such way or other matter during the continuance of such term, shall be excluded in the computation of the said period of forty years; provided the reversioner contests the claim within three years after the lease expires.²

The common law as to the acquisition of easements has not been superseded by the Prescription Act, although it has given some increased facilities to a party claiming an easement. He may proceed on election, either under the statute, or according to the common law, or both.³ Where he proceeds under the statute, no presumption can be founded upon an enjoyment for a shorter period than that which is applicable under the Act to the case in question; ¹ whereas, at common law, a shorter time, if aided by confirmatory evidence, has been held sufficient to support a verdict.⁵

The Prescription Act does not supersede the common law.

¹ *Ennor v. Barwell*, 6 Jur., N. S. 1233; affirmed 1 De G. F. & J. 529; 4 L. T. 597.

² See Mr. Gale's explanation of this section, p. 188; and *Wright v. Williams*, 1 M. & W. 77; *Only v. Gardiner*, 4 M. & W. 496; *Richards v. Fry*, 7 A. & E. 698; 45 R. R. 816; *Jones v. Price*, 3 Bing., N. C. 52; *Palk v. Skinner*, 18 Q. B. 568; *Clayton v. Corby*, 2 Q. B. 813; *Pye v. Mumford*, 11 Q. B. 675.

³ Gale, pp. 177, 532; Phear, *Rights of Water*, p. 79; *Warrick v. Queen's College*, L. R., 6 Ch. 728; *Ladyman v. Grave*, L. R., 6 Ch. 764, n.; *Aynsley v. Glover*, L. R., 10 Ch. 283.

⁵ Per Lord Ellenborough in *Bealey v. Shaw*, 6 East, 215; 8 R. R. 466; per Chambre, J., in *Windymer v. Hadden*, 5 Taunt. 125; and see *Ileg. v. Petrie*, 4 E. & B. 737.

By and
against whom
claims by
prescription
may be made.

As the right to an easement can only exist in respect of a tenement, the continued user by which the easement is to be acquired must be by the person in possession¹ of, or claiming under the owner of, the dominant tenement; and as such user is evidence of a previous grant, and as the right claimed is in its nature not of a temporary kind, but one which permanently affects the rights of property in the servient tenement, it follows that such grant can only have been legally made by a party capable of imposing such a permanent burthen upon the property, *i.e.*, the owner of an estate of inheritance,² and, therefore, in order that such user may confer an easement, the owner of the servient inheritance must have known that the easement was enjoyed, and also have been in a situation to interfere with and obstruct its exercise, had he been so disposed; his abstaining from interference will then be construed as an acquiescence,³—*contra non volentem agere non currit prescriptio*.⁴

In the case of *Outram v. Maude*,⁵ in 1791 A. obtained a demise from B. of an underground goit or drain to be then constructed in B.'s land, for the purpose of conducting water from A.'s mill so long as an annual rent should be paid by A. to B. In 1836 the demise of 1791 was put an end to, and liberty was given to A., who was at that time yearly tenant from B. of the land through which the goit ran, to change the goit or drain of 1791, and to substitute a new cut for conducting pure and clean water at the like rent. The new cut was made and used for pure water, and the old goit (as the plaintiff alleged) continued to be used for foul water.

In 1866 the land through which the goit ran was sold to C., and in 1867 A.'s yearly tenancy of the land was determined. In an action by A. in 1879 to restrain C. from interfering with his use of the old goit, to which he claimed title by prescription from alleged open and uninterrupted use and enjoyment thereof from 1856, it was *held*, that until 1867 A. could not acquire an easement in the land of which he was yearly tenant, distinct from the use and enjoyment of such land, as against B. his landlord,

¹ See *Gared v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353; 13 L. T. 74; where the lessee or licensee of the right of digging clay, was held to have sufficient interest in the soil to claim a prescriptive right to the flow of water under 3 & 4 Will. IV. c. 71; see *Ivimey v. Stocker*, L. R., 1 Ch. 396; *Outram v. Maude*.

² *Daniel v. North*, 11 East, 372; see

Phear, Rights of Water, pp. 80, 85; 1 Wms. Saund. 346; 2 Wils. 258. See also as to rights of lessees of mines, *Chamber Colliery Co. v. Hopwood*, *post*, p. 237, n. 5.

³ *Gray v. Bond*, 2 Brod. & Bing. 667; 23 R. R. 530.

⁴ Gale, p. 191.

⁵ 17 Ch. D. 391; 50 L. J., Ch. 783; 29 W. R. 818.

and accordingly that, assuming the open and uninterrupted user from 1836 to have been proved, he had failed to establish any title by prescription as against C.

As by the common law, the title to an easement is from a presumed grant by the owner of the servient tenement, and as only such easements can be claimed by the Prescription Act as could be lawfully claimed at common law, by custom, prescription, or grant, no claim can be founded by long user to any easement which the servient owner is under a legal or physical disability to grant. Thus, in the case of *Chasemore v. Richards*,¹ where the action was for intercepting percolating water, the House of Lords held that as no grant could have been made of such percolating water, length of time could raise no presumption of such a grant.

No easement can be claimed when the servient owner is "under a disability to grant."

So, in *The Staffordshire Canal v. Birmingham Canal*,² where a prescriptive claim, by user of forty years, was set up to a use of water which a canal company was not empowered to make by their Act, Lord Chelmsford, L. C., says, "To impose such a servitude upon the water in their canal as that contended for by the appellants, would have been *ultra vires* of the respondents, and consequently length of user could never confer an indefeasible claim upon appellants under the Prescription Act, as no grant of the use of the water could have been lawfully made by the respondents."³

So, in *The Rochdale Canal v. Radcliffe*,⁴ the owners of land within twenty yards of a canal were empowered by statute 34 Geo. III. c. 78, to take water from the canal for the sole purpose of condensing steam for their engines, such water to be returned to the canal (allowing for inevitable waste) so that no obstruction should accrue to the navigation, the surplus water to go to the Bridgwater Canal. The company sued the defendant for taking more water than was sufficient for condensing steam, and for using it for other purposes. The defendant pleaded a user as of right for twenty years to draw off so much water as was necessary for other purposes. The jury found the twenty years' user as of right, and a verdict was ordered to be entered for the

¹ 7 H. L. C. 349. See also *Ewart v. Belfast Guardians*, 9 L. R., Ir. 172; *ante*, pp. 198, 213.

² L. R., 1 H. L. 254; *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; *National Manure Co. v. Donald*, 4 H. & N. 8; see also *Ellwell v. Birmingham Canal*, 3

H. L. 812; see *post*, pp. 298 *et seq.*

³ See *Brymbo Water Co. v. Lester's Lime Co.*, (1894) 8 R. 329.

⁴ 18 Q. B. 287; 21 L. J., Q. B. 297; see also *Manchester Ship Canal v. Rochdale Canal Co.*, 81 L. T. 472, C. A.; affirmed by H. L. (1902), 85 L. T. 585.

defendants. On a motion by the plaintiffs for judgment, *non obstante veredicto*, the Court of Queen's Bench held, that the company could not, consistently with the Acts of Parliament regulating their canal, have granted the water for other purposes than that permitted by the statute 34 *Geo. III.* c. 78. That an actual grant, if proved, for the purposes mentioned in the plea, would have been illegal and no justification, and, therefore, that the grant for such purposes, implied from twenty years' user, was no legal defence.

In *McEroy v. Great Northern Railway*,¹ prior to 1849 the plaintiff's predecessors had enjoyed the right to take water from a natural stream flowing near their holding. In 1849, the defendant railway company, in constructing their line, interfered with or tapped the subterraneous course of this stream, which ceased thenceforward to flow; the water that had supplied it finding its way to the surface at a cutting on the company's line. This water the company conveyed along and away from their line in a new artificial channel. The water of this new stream was not until 1898 used by nor was it of any use to the company. In 1898 the company commenced to make use of this water supply for their own purposes, and the plaintiff, who had been taking the water thereof since 1849 for domestic purposes, brought an action for disturbance of a prescriptive right. The jury found that the new stream was substituted for the old, and that the company had not constructed the new channel until they should require to use the water for their own purposes. Held, that, this new artificial watercourse being made for the benefit of the company on the company's own land, no enjoyment of the water thereof while the water was of no use to the company could create a prescriptive right in the plaintiff; and, further, that the existence of such a right would be inconsistent with the purposes of the incorporation of the company, and with the obligations of the company to provide for the security of their permanent way and the safety of the public; and that the new artificial stream not being the same as the stream formerly in existence, no contract in regard thereto, as an "accommodation work" within sect. 16 of the Railway Clauses Act, 1845, could be presumed.

Enjoyment
must be *nec
vi, nec clam,
nec precario*,

The enjoyment which, by length of time, both at common law and under the statute, will confer the right to an easement must

¹ (1900) 2 Ir. R. 325 (C. A.).

be uninterrupted,¹ open,² and of right,—*nec vi, nec clam, nec precario*.³ Where, therefore, the right⁴ claimed has been interrupted by any lawful impediment, or where the easement has, either from the mode in which the party enjoys it, or from the nature of the easement itself, been secret, or where again the enjoyment has originated under licence or permission from the owner of the servient tenement, no right will be gained by length of time.⁵ Under the statute, however, where the right to a watercourse has existed for forty years, it will not be invalidated unless such licence be by deed or writing.⁶

In *French Hoek Commissioners v. Hugo*,⁷ which was an appeal from a judgment of the Supreme Court of the Cape of Good Hope, the respondent's predecessor in title in 1820 constructed a watercourse on Crown lands, by means of which he diverted the water of two springs which rose thereon, so that they mingled

¹ An act of partial interruption may qualify an easement without destroying it. Thus in *Rolle v. Whyte* (L. R., 3 Q. B. 286; 37 L. J., Q. B. 105; 17 L. T. 560), where a weir was claimed across a river by prescription, and a miller on the banks was proved to have occasionally interrupted it by shutting down a fender, it was held that this did not destroy the right, as there was nothing to prevent a second easement being acquired, as subordinate to one already existing, where the subject-matter admitted of it.

² See *Angus v. Dalton*, 3 Q. B. D. 85.

³ Civ. Law, 1, ff. de serv. l. 10, ff.; Co. Litt. 113 b; Bracton, lib. 2, f. 51, f. 52 a, 222 b. See also *Chamber Colliery v. Hopwood*, 32 Ch. D. 549; 55 L. J., Ch. 859; 55 L. T. 449; *Burrows v. Lang*, (1901) 2 Ch. 503, *post*, p. 262.

⁴ Angell, p. 369; see *Gured v. Martyn*, *post*, p. 256, where the question of right is fully treated; *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 578.

⁵ See per Erle, C. J., 17 Q. B. 275; *Bright v. Walker*, 1 C., M. & R. 219; 40 R. R. 536; Gale, pp. 204, 208. The defendants in 1834 demised to the plaintiffs the coal under the Chamber Hall Estate for fifty years, with powers to sink pits, make soughs, &c., erect engines, and make drains, &c., for supplying such engines with water, and also to do certain other acts on the surface for the better draining and working the demised mines of which the plaintiffs might become lessees under the lands of any other persons. In 1836 the plaintiffs took a lease for thirty-five years of the Oak Colliery from a neighbouring landowner. In 1846 the plaintiffs made

a drain about a mile long, chiefly on the Chamber Hall Estate, by which they diverted a small natural stream on the Chamber Hall Estate, and brought it down to the Oak Colliery, where they made reservoirs for the water at considerable expense. They did not ask leave to make the drain, but the defendant's agent saw the work going on and encouraged it. In 1872 the plaintiffs became owners in fee of the Oak Colliery. In 1884, when the lease from the defendants expired, the defendants stopped the drain and diverted the water. The plaintiffs, claiming a right by prescription to the water, commenced this action to restrain them from doing so. The Vice-Chancellor of the County Palatine held that the watercourse was made under the powers of the lease, and he dismissed the action. *Held*, on appeal, that this dismissal was right, for that if the making of the drain was not authorized by the lease (as to which the Court gave no opinion), it was made and enjoyed, either under the belief of both parties that it was authorized by the lease, or under a comity between landlord and tenant, and that there was no enjoyment as of right so as to give the tenant a right to the water after the lease had expired. *Chamber Colliery Co. v. Hopwood*, 32 Ch. D. 549; 55 L. J., Ch. 859; 55 L. T. 449; 51 J. P. 164 (C. A.).

⁶ 2 & 3 Will. IV. c. 71, s. 3; see per Blackburn, J., in *Mason v. Shrewsbury Railway*, L. R., 6 Q. B. 578.

⁷ 10 App. Cas. 336; 54 L. T. 92; 34 W. R. 18, P. C. See also *Breda v. Silberbauer*, L. R., 3 P. C. 84.

with the waters of a private stream admittedly belonging to the farm of which the respondent owned a portion. He did so with the licence of those who acted as agents for the Government, in order to have the permanent use of the water for his farm, and continued his user for the period of prescription; after which the respondent applied for and obtained from the Colonial Government a renewal of the licence originally granted to his predecessor.

The Judicial Committee held that the user of the diverted water by the respondent's predecessor was not precarious, and that the act of the respondent had not deprived him of the prescriptive right acquired by his predecessor so as to enable the Crown to give to the plaintiffs in 1881 a title to the said water.

So in *Brymbo Water Co. v. Lester's Lime Co.*¹ it was held that the fact that an embankment was occasionally out of repair during a term of years, or too low when the water was high (*e.g.* in a flood), and so allowed water to overflow into other land, could give the owner of that land no prescriptive right to the overflow.

Interruptions, though not acquiesced in for a year, may show that the enjoyment never was of right, but contentious throughout, though, if once the enjoyment as of right has begun, no interruption for less than a year can defeat it.²

and adverse.

In order, moreover, to raise the presumption of a grant of an easement in a watercourse, the user or enjoyment must have been adverse,³—that is, have interfered with the enjoyment of the owner of the servient tenement. “By usage,” says Cresswell, J., delivering the judgment of the Court in *Sampson v. Hoddinot*⁴ “(a man) may acquire a right to use the water in a manner not “justified by his natural right; but such acquired right has no “operation against the natural right of a landowner higher up “the stream, unless the user by which it was acquired affects the “use that he himself has made of the stream or his power to use “it, so as to raise the presumption of a grant, and so render the “tenement above a servient tenement. If the user of the stream “by the plaintiff for irrigation was merely an exercise of his “natural right, such user, however long continued, would not “render the defendant's tenement a servient tenement, or in any “way affect the natural rights of the defendant to use the water.

¹ 8 R. 329 (1894).

³ Angell, p. 368.

² *Eaton v. Swansea Waterworks Co.*,
17 Q. B. 267; 20 L. J., Q. B. 482.

⁴ 1 C. B., N. S. 611.

“ If the user by the plaintiff was larger than his natural rights
 “ would justify, still there is no evidence of its affecting the
 “ defendant’s tenement, or the natural use of the water by the
 “ defendant, so as to render it a servient tenement. But if the
 “ user by the defendant has been beyond his natural right, it
 “ matters not how much the plaintiff has used the water, or
 “ whether he has used it at all. In either case his right has
 “ been equally invaded, and the action is maintainable.”

User, moreover, which is neither physically capable of prevention by the owner of the servient tenement, nor actionable, cannot support an easement either affirmative or negative.¹

An easement may also be claimed by particular custom, as in the inhabitants of a district to use a common watering place; and an action will lie by an inhabitant for the infringement of the right, without proof of special damage.² Thus, in *Harrop v. Hirst*,³ where the plaintiff had, in common with the inhabitants of a particular district, enjoyed a customary right at all times to take water from a spout in a highway for domestic purposes, and defendant, a riparian owner, stopped the water, the Court held that an action was maintainable without any proof of special damage, inasmuch as the act of defendant might, if repeated often enough, without interruption, furnish evidence in derogation of the plaintiff’s legal rights.

Claim to easements by custom.

So, in *Race v. Ward*,⁴ and *Manning v. Wasdale*,⁵ a right to go on another’s land and take water for domestic purposes, was held to be an easement, and not a *profit à prendre*, and so capable of being claimed by custom by the inhabitants of a district. Where a well situate on private property was freely used without hindrance or interruption, as far back as living memory went, principally by the inhabitants of some neighbouring houses, but also by all persons who had occasion to resort to the well, and a path existed during all that time affording access to the well from a public road, it was held that although it was a public well under sect. 74 of the Public Health (Ireland) Act, 1878 (41 & 42 Vict. c. 52), a right in the public to enter and take water from the well could not be supported by prescription, that it was too wide

¹ *Sturges v. Bridgman*, 11 Ch. D. 852; *Webb v. Bird*, 13 C. B., N. S. 841; *Chasemore v. Richards*, 7 H. L. 349; see *Angus v. Dalton*, 3 Q. B. D. 85; 4 Q. B. D. 162.

² *Westbury v. Powell*, cited in *Fineux*

v. Hoveden, Cro. Eliz. 664.

³ L. R., 4 Ex. 43; 38 L. J., Ex. 1; 19 L. T. 426; see *Iriney v. Stocker*, L. R., 1 Ch. 396; 35 L. J., Ch. 467; 14 L. T. 427.

⁴ 4 E. & B. 702.

⁵ 5 A. & E. 758; 44 R. R. 576.

to be the subject of a custom, and that it could only arise from a dedication to the public by the owners from time immemorial of the land on which the well existed.¹

In *Carlyon v. Lovering*,² a right was claimed by custom to use a natural stream for the purpose of washing ore, and carrying away sand, stones, rubble, and other stuff dislodged and severed from the soil in working a mine. The Court found the custom to be good, and Watson, B., in delivering judgment, thus states the law with regard to customs: "It is settled that a custom to be valid in law must be reasonable, certain, and defined. It was objected that the custom pleaded in the present case was unreasonable and indefinite, as the exercise of the custom might go to the destruction of the plaintiff's land adjoining the stream: that there was no limit to the user as to the times and extent of the user. No doubt if that were so, the pleas would be bad; but we think they are not open to these objections. The exercise of the privilege as claimed was in respect of working a mine and winning the ore where the stream passed through defendant's land. Thus, the user is limited to the necessary working of the mine, and the quantity of water sent down, although not expressly so alleged. . . . We think that the custom alleged is sufficiently definite, and is not unreasonable. It is possible more stuff may come down at one time than another; but that does not show that the custom is bad (see *Tyson v. Smith*).³ We think it is to be confined in user to the necessary working of the mine, &c."

Particular Easements of Water.

The right which a riparian owner has to the flow of a natural stream in its natural state, may be interfered with by the acquisition of easements, the effect of which may be to alter its quantity, velocity, or quality, to his prejudice. Thus, a right to divert and obstruct the flow of the stream, or to pollute its waters, may be gained by Act of Parliament,⁴

¹ *Dungarvan Guardians v. Mansfield*,

1 Ir. R. 420 (1897); see *ante*, p. 178, n. 4.

² 1 H. & N. 784; 26 L. J., Ex. 251.

³ 6 A. & E. 745; 9 A. & E. 406;

48 R. R. 539. See *Irimey v. Stocker*,

L. R., 1 Ch. 396, and *Gared v. Martyn*,

34 L. J., C. P. 353; 13 L. T. 74; 14 W. R.

62, as to acquisition of watercourse by tin-bounders under custom of Cornwall.

⁴ A water company, who were autho-

rized in 1869 by their Act to make a reservoir with a dam across a stream, and to impound all waters of that stream and of other streams then flowing into that stream above the dam, and so become owners of the reservoir through the site of which the stream originally flowed, have the right to stop any person from diverting the water which at that time came down, or but for a stoppage

by express grant, or by long enjoyment, as prescribed by law.¹

"The general rule of law," says Lord Ellenborough,² "as applied to this subject, is, that, independent of any particular enjoyment used to be had by another, every man had the right to have the advantage of a flow of water in his own land, without diminution or alteration; but an adverse right may exist founded on the occupation of another; and though the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet, if the occupation of the party so taking or using it have existed for so long a time as may raise the presumption of a grant, the other party whose land is below must take the stream subject to such adverse right."

"The right of diverting water," says Cockburn, C. J., in *Mason v. Shrewsbury Railway Co.*,³ "which, in its natural course, would flow along the land of a riparian owner, and of conveying it to the land of the party diverting it, the *servitus aquæ ducendæ* of the civilians, is an easement well known to the law of this, as of every other country. Ordinarily, such an easement can be created by the laws of England only by grant or by long-continued enjoyment from which the existence of a former grant may be reasonably presumed. But such a right may, like any other right, be created in derogation of a prior right by the action of the legislature. But, however it is called into existence, the right is essentially the same." From the above case, it would seem that a right to divert the waters of a natural stream, for the purposes of a canal, is an easement which may be conferred on a company by their Act of Parliament, and, as such, subject to the law of easements generally.

Easement of diversion and obstruction.

Of the acquired right to divert the waters of a stream, the cases of *Beeston v. Weate*⁴ and *Saunders v. Newman*⁵ afford examples. In the former case, it was held that a right by the owners of the dominant tenement to go from time to time upon the servient tenement for the purpose of diverting the water of a

would come down, as part of that stream or its tributaries above the dam, and as to which the person diverting could have been restrained from continuing his diversion at the suit of a lower riparian owner, but not to stop any person using water above who had a right to do so at the time their Act was passed. *Brymbo Water Co. v. Lester's Lime Co.*, (1894) 8 R. 329.

¹ *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Embrey v. Owen*, 6 Ex. 353; *Howard v. Wright*, 1 Sim. & Stu. 190; 24 R. R. 169.

² *Bealey v. Shaw*, 6 East, 208; 8 R. R. 466.

³ L. R., 6 Q. B. 586; 40 L. J., Q. B. 293; 25 L. T. 239.

⁴ 5 E. & B. 986.

⁵ 1 B. & A. 258; 19 R. R. 312.

natural stream flowing along it, so as to cause it to pass through that tenement by an artificial cut to the dominant tenement for the purpose of supplying cattle with water, might be inferred from a user of forty years, and that for the interruption of such easement an action was maintainable. The Court further held, that the fact that the water was diverted by means of an artificial cut did not destroy the right of action by the owner of the dominant tenement.

In *Saunders v. Newman*,¹ the plaintiff proved a right to the flow of water to a mill for forty years, which mill was burnt down and another erected in its place, with a wheel of the same dimensions as the former one. Since that time, he had erected a new wheel of different dimensions, and requiring less water. The action was brought for injury to this last wheel by a hatch dam or mill head of defendants being raised to a greater height than it had formerly been, and the Court held that the right of action which the plaintiff had for an interference with a stream which had immemorially flowed to his mill, was not destroyed by the alteration of the wheel. "If," says Bayley, J., "a person stops the current of a stream which has immemorially flowed in a given direction, and thereby prejudices another, he subjects himself to an action."²

Diversion or obstruction cannot be materially increased.

Where, however, an easement has been acquired, the diversion or obstruction cannot be materially altered or increased to the further detriment of the servient owner. Thus in the case of *Bealey v. Shaw*³ it was held, that where a mill owner had acquired a right by twenty years' uninterrupted user to divert a part of a stream for the use of his mill, he was liable to an action at the suit of a lower mill owner for a further subsequent diversion to the lower mill owner's injury. So in *Brown v. Best*,⁴ where defendant had enlarged certain ancient pits by which he had a right to divert water, and thereby damaged the plaintiff—it was held that he might have cleaned the pits, but could not enlarge them.⁵

A mere alteration does not destroy the right.

A mere alteration in the mode of enjoyment, as the change of a mill from a fulling to a grist mill or the like, whereby no

¹ 1 B. & A. 258; 19 R. R. 312.

² See also as to diversion for irrigation, *Ward v. Robbins*, 15 M. & W. 237.

³ 6 East, 208; 8 R. R. 466; see also *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Alder v. Savile*, 5 Taunt. 424; 15 R. R. 551.

⁴ 1 Wils. 174.

⁵ See as to the Civil Law of Quebec on this subject, *Isaie Frechette v. La Compagnie de St. Hyacinthe*, 9 App. Cas. 170; 53 L. J., P. C. 20, where the English cases are discussed.

injury is caused to the servient heritage,¹ or a trifling alteration in the course of a watercourse, does not destroy the right. Thus in *Hall v. Swift*² it appeared that plaintiff had, three years ago, slightly altered the course of a stream, which flowed from lands of defendant through a spout and across a lane to plaintiff's land. The stream had formerly run a few yards down the road before it crossed to plaintiff's land, but the plaintiff altered it so as to make it run straight from the spout to his premises. The Court held this alteration did not destroy the plaintiff's right of action for obstruction of the stream by defendant.³

A right to pollute the waters of a natural stream is an easement within the Prescription Act, and may be acquired, like any other easement, by user;⁴ but there can be no prescriptive right to pollute a stream in such a manner and to such an extent as to be injurious to public health.⁵

Easement of pollution.

Thus a claim to let off upon neighbouring land water from pits impregnated with metallic substances, and thereby rendered noxious, may be acquired by forty years' user under the Prescription Act.⁶ So a right to use a natural stream for the purpose of washing ore and carrying away sand, stones, rubble, and other stuff dislodged and severed from the soil in working a mine, may be claimed by prescription or custom.⁷

Such a right to pollute a stream can only be gained by a continuance of a perceptible amount of injury to the servient tenement for twenty years. Thus in *Murgatroyd v. Robinson*,⁸ where an action was brought by the owner of a mill, which of right ought to be supplied with a flow of water from a pool on the river Calder, against the owner of works higher up the stream, for placing cinders, &c. at his works so as to fall into the Calder, whence they were carried down to plaintiff's mill pool and filled it up, and the defendant pleaded that the occupiers of his works had for more than twenty years placed cinders, &c.

Can only be gained by a continuous and perceptible amount of injury for twenty years.

¹ *Luttrell's case*, 4 Rep. 86.

² 6 Scott, 167; 44 R. R. 728; 4 Bing., N. C. 381. As to effect of alteration on the easement of light, see *Barnes v. Loach*, 4 Q. B. D. 494; *Tapling v. Jones*, 11 H. L. 290; *National Plate Glass Co. v. Prudential Assurance Co.*, 6 Ch. D. 757; *Blanchard v. Bridges*, 4 A. & E. 176; 53 R. R. 26; *Ellis v. Manchester*, 2 C. P. D. 13.

³ See *Devey v. Grand Canal Co., Ir.*, 8 C. L. 511, affirmed Ir. R., 9 C. L. 194.

⁴ *Wood v. Waud*, 3 Ex. 748; 18 L. J., Ex. 305.

⁵ *Blackburn v. Somers*, 5 L. R., Ir. 1.

⁶ *Wright v. Williams*, 1 M. & W. 77.

⁷ *Carlyon v. Loring*, 1 H. & N. 797; see also *Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. 478; *Bazendale v. McMurray*, L. R., 2 Ch. 790; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Moore v. Webb*, 1 C. B., N. S. 673.

⁸ 7 Ell. & Bl. 391.

on the banks of the stream and its channel, the Court held the plea bad, as not showing that the defendant had, during twenty years, of right caused the refuse to go into plaintiff's pool; as till the occupiers of the mill sustained some damage from defendant's user, no right as against them began to be acquired.¹

In *Goldsmid v. Tunbridge Wells*,² where an injunction was granted to restrain the draining of a town into a stream passing through the plaintiff's lands, the defendants proved that the sewage of the town had always flowed into the stream, and, on that ground, set up a prescriptive right to continue the discharge. It was, however, proved that though some sewage did formerly flow, and for fifty years had flowed into the brook, that, nevertheless, about ten years ago the water was pure and fit for domestic use, and that the pollution had since then gradually increased. Under these circumstances Sir J. Romilly, M. R., held the prescriptive right was not proved, and granted the relief prayed. "My opinion is," says the learned judge, "that any person who has a watercourse flowing through his land, and sewage which is perceptible is brought into that watercourse, has a right to come to the Court of Chancery to stop it; and that when the pollution is increasing, and gradually increasing from time to time, by the additional quantity of sewage poured into it, the persons who allow the polluted matter to flow into the stream are not at liberty to claim any right or prescription against him." The case was affirmed on appeal, Turner,³ L. J., remarking with regard to the claim of prescriptive right, "I assume, but without meaning to give any opinion on the point, that such a right might well be acquired, but then I think it could be acquired only by a continuance of discharge of the sewage prejudicially affecting the estate, at least, to some extent, for the period of twenty years; and I think the evidence sufficiently shows that the discharge has not prejudicially affected the estate for so long a period."

Fouling must not be considerably increased.

Where a right to pollute a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of the servient tenement, but the user which originated the right must also be its measure.⁴ Thus in *McIntyre v. McGavin*,⁵ the

¹ See *Flight v. Thomas*, 10 A. & E. 590.

² L. R., 1 Ch. 352; L. R., 1 Eq. 161; 35 L. J., Ch. 382; 14 L. T. 154; see also *Sampson v. Hoddinot*, ante, p. 238.

³ L. R., 1 Ch. 349.

⁴ *Crossley v. Lightowler*, L. R., 2 Ch. 478; *Blackburn v. Somers*, 5 L. R., Ir. 1.

⁵ (1893) A. C. 268; 1 R. 246; 57 J. P. 548. H. L. Sc.

House of Lords has laid down that a riparian proprietor who has a prescriptive right to take, in a particular way and at a particular place, water from a river and to return such water to the river in a polluted condition, is not entitled to take the water in any other way or place, nor use even his common law right of taking it in such a way as to add to the pollution of the stream.

This case was an appeal from a judgment of the Court of Session affirming the decision of the Lord Ordinary. The appellants, proprietors of bleaching works on the river Dighty, had for the prescriptive period taken a supply of pure water from the river as it passed their works on Sunday and on Monday mornings, at which times the water is comparatively pure, and returned it to the river polluted. They now asserted their right to take throughout the week, from a point about a quarter of a mile below their works, water entering the Dighty which had remained pure, notwithstanding their prescriptive pollution, and to return it to the river in a polluted state. The respondents had obtained an interdict to prevent this abstraction, which they alleged was prejudicial to them. Lord Watson says,¹ "A prescriptive right to take in a particular way, and at a particular place, pure water which is returned to the stream in an impure state, infers no right to take the supply of pure water in any other way and at any other place. I think the appellants had no right to make the alteration which they did upon the mode of supplying pure water to their works, unless they were in a position to show that the change could not by possibility affect the interest of heritors below. A proprietor who has prescribed a right to pollute cannot, in my opinion, use even his common law rights in such a way as to add to pollution."

In an action for polluting a stream, where a prescriptive right to do so is claimed, it is for the jury to say whether the right claimed is an immemorial and unlimited right of polluting the stream, or the more limited right of doing so for the purposes of a business as carried on for more than twenty years.²

Thus, in the case of *A.-G. v. Borough of Birmingham*,³ it was proved that, before the passing of the Birmingham Improvement Act, the drainage of the town and neighbourhood was chiefly effected by various small sewers, which flowed into the Rea, a

¹ (1893) A. C., at p. 277.

² *Moore v. Webb*, 1 C. B., N. S. 673 ; see *Roockdale Canal v. Radcliffe*, 18 Q. B.

287.

³ 4 Kay & J. 528 ; see *ante*, p. 169.

tributary of the Tame; and that the sewage, owing to the distance it had to travel, and to its flowing through a variety of small outlets, became gradually purified by filtration, before it reached the estates of the plaintiff, a riparian owner, about seven miles off, so that the waters were well filled with fish, and could be used for brewing and domestic purposes. After the passing of the Act before mentioned, which incorporated the Towns Improvement Act, the 107th section of which Act provides, that nothing therein shall render lawful any act, which, but for the Act, would be a nuisance; the whole of the sewage was discharged by a main sewer into the Tame at the point where it was joined by the Rea, and the effect of this was to pollute the river Tame downwards to and beyond the plaintiff's estate, to such an extent that the fish died, and cattle could no longer drink of the water. On an information at the relation of the plaintiff, Wood, V.-C., held, that though the council of the borough were bound by their local Act to drain the town, they were not justified in so doing in increasing the nuisance to the extent proved. With regard to the prescriptive right claimed, the learned Vice-Chancellor says: "It was argued that the inhabitants of Birmingham had a right "to drain their houses into the Rea, and thence into the Tame; "but this, at least, is in evidence, that the alleged right, as "exercised (assuming it to be a right), did not pollute the water "of the Tame as it does now; did not kill the fish, or prevent "the cattle from drinking of the river; but immediately the "defendants' sewers were opened, the fish were killed in the "river, and the cattle would no longer drink of it; and their "cause and effect are clearly pointed out. The same sort of "argument was addressed to me in the *Luton case*.¹ There it "was contended, and in fact the plaintiff admitted, that the "inhabitants had a right to open their sewers into the river; "and the defendants, acting on behalf of the community, claimed "to exercise all the rights which its several members possessed. "But the answer is this. The right thus claimed is like that "which exists in the case of adjoining mines upon different "levels. From the necessity of the case, every owner of a mine "must submit to the inconvenience of having the water of an "adjoining mine upon a higher level descend upon his mine, so "long it descends in the natural course of drainage; but that "does not entitle the owner of the adjoining mine to throw upon

¹ *A.-G. v. Luton*, 2 Jur., N. S. 180; see *A.-G. v. Kingston*, 13 W. R. 888.

"him, in some other and more objectionable way, water which might be allowed to descend upon him in a modified form, not occasioning the same amount of injury to his property. So here, before the defendants' operations, the drainage of Birmingham, entering the river in dribblets, and at different parts of the stream, was largely diluted before it reached the plaintiff's property, and did not subject him to that inconvenience of which he now complains."¹ The learned Vice-Chancellor also held, that the fact that a vast population would suffer if the town remained undrained, and unless the rights of the plaintiff were invaded, was one which the Court could not take into consideration;² and that though the plaintiff had submitted to the injury for four years, trusting to the assurances of the defendants that it would be remedied, he was not precluded from relief.³ In *The Metropolitan Board of Works v. London and N. W. Rail. Co.*,⁴ it was held by the Court of Appeal that in the absence of a prescriptive right to do so the defendants had no right under sect. 61 of the Metropolitan Management Act, 1862, to drain newly-erected houses into a sewer of the plaintiffs.

As in the case of diversion and obstruction, a mere change in the quality of the polluting discharge, not increasing as against the servient tenement, to any substantial or tangible degree the amount of pollution, does not destroy the easement.⁵ In the case of *Bazendale v. McMurray*,⁶ the defendant, the owner of an ancient paper-mill, where paper had been made of rags, introduced a new vegetable fibre, and carried on the works on the same scale for making paper from this new material. For more than twenty years before this change, the refuse arising from the paper manufacture had been discharged into the stream which ran past plaintiff's house. The Lords Justices held, reversing a decree of Stuart, V.-C., that the easement to which defendant was entitled was to be presumed to be, not a right to foul the

A mere change in the quality of pollution does not destroy the easement.

¹ See also *Moore v. Webb*, 1 C. B., N. S. 673; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Kingston*, 13 W. R. 888; *A.-G. v. Halifax*, 39 L. J., Ch. 129; *A.-G. v. Luton*, 2 Jur., N. S. 180; *Goldsmid v. Tunbridge Wells*, L. R., 1 Ch. 345; *Cator v. Lewisham*, 11 Jur., N. S. 340.

² See also *Pennington v. Brinsop Hall Co.*, 5 Ch. Div. 769, and *ante*, pp. 166—171 *et seq.*

³ See as to this, *A.-G. v. Leeds*, L. R., 5 Ch. 594, per Lord Hatherley, L. C.

⁴ 17 Ch. D. 246, *ante*, p. 175; *A.-G. v. Acton Local Board*, 22 Ch. D. 221; 52 L. J., Ch. 108; 47 L. T. 510.

⁵ See as to this, *Somerset Drainage Commissioners v. Bridgwater Corporation*, 81 L. T. 72, H. L. (E.), *ante*, p. 180, n. 1.

⁶ L. R., 2 Ch. 790; see also *A.-G. v. Nichol*, 16 Ves. 338; 10 R. R. 186.

stream by discharging into it washings produced by the working up of rags, but a right to discharge into it the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using only proper materials for the purpose, but not increasing the pollution, and that the *onus* lay on the plaintiff to prove any increase of pollution.

In *Clarke v. Somersetshire Drainage Commissioners*,¹ it appeared that from 1832 to 1877 the refuse of a fellmongery and the washings of dyes used in a coloured rug manufactory had been discharged into a watercourse. In 1878 the fellmongery was abandoned, and the manufacture of leather boards substituted at the same factory. The pollution caused by the discharge of the refuse of the leather board manufactory was less in degree than that caused by the fellmongery. On appeal from a conviction at Quarter Sessions the Court of Queen's Bench Division held, distinguishing the case from that of *Baxendale v. McMurray*,² that the conviction must be confirmed, for even if the factory owners had a prescriptive right to foul the stream, it was as fellmongers, and not as leather board manufacturers; and that there was no authority for holding that the variation of the user, although it cast no increased but even a less burden on the the servient tenement, enabled the factory owners to substitute a business of a totally different kind to that originally carried on by them, and at the same time claim to maintain their original prescriptive right to pollute the watercourse, even if such right did exist.

Easement of
artificial
watercourse.

The right to discharge water over the lands of others, or to receive the discharge of water from the lands of others by means of watercourses artificially created, is obviously not a natural right of property, but is the subject-matter of contract between the parties.³ As such it may be established, like any other easement, either by express grant, or by prescription which presumes a grant. Such right may obviously be created for the sole benefit of the person discharging the water, or for the sole benefit of the person receiving the discharge, or for the mutual benefit of both. Where the right is created by express contract, the rights of the various parties will be regulated by the words of the deed³ creating the right. Where it depends on

¹ 57 L. J., M. C. 96; 59 L. T. 670; 36 W. R. 890.

² L. R., 2 Ch. 790.

³ See *Sharp v. Waterhouse*, 3 Jur., N. S. 1022.

prescription, the user which originated the right must also be its measure.¹

The various kinds of artificial watercourses were carefully considered by Bowen, L. J., in a recent case.² "In this case," says the learned Judge, "we have to decide a question of fact—whether there has been for twenty years an enjoyment as of right of the use of the sough within the meaning of the Prescription Act. First of all, what is the right claimed? It is a right of a peculiar kind—to enjoy an artificial watercourse. When we deal with artificial watercourses we have to exercise care in drawing the inference of fact owing to the nature of the subject-matter. There may be two kinds of right claimed; first of all a man may claim a right to continue the enjoyment upon his land of the discharge on to his land of an artificial watercourse made by somebody else above. That is a very difficult kind of right to establish. The mere discharge of water by an upper proprietor upon the land of a lower, may easily establish a right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above, but it is difficult for the lower proprietor to establish a right to have the flow continued, just as it would be very difficult to make out that because for twenty years my pump has dripped on to a neighbour's ground, therefore he has a right at the end of twenty years to say that my pump must go on leaking. The claim that is being made in the present case is not exactly that. It seems to me to be really a claim to conduct a watercourse across another man's land to your own. It is accompanied with a claim of some right in this watercourse which was made by the defendants. Has there been enjoyment of such a right as a right for twenty years? That is a pure inference of fact to be drawn from all the circumstances of the case. The law is explained in *Wood v. Waud*,³ which has been followed ever since both by the Courts of Common Law and by the Court of Chancery. The inference of fact must be drawn from all the circumstances of the case. We

¹ *Crossley v. Lightowler*, L. R., 2 Ch. 478. 32 Ch. D. 549; 55 L. J., Ch. 869; 55 L. T. 449.

² *Chamber Colliery Co. v. Hopwood*, 3 Ex. 748.

"must look carefully at the relation of the parties between whom this sort of enjoyment has been had, and when you get a landlord on the upper part and a tenant below, you must bear in mind that the case is one in which enjoyment may easily be accounted for without there having been any claim of right during any part of the period. Also you must look very carefully at the character of the watercourse, especially if there is a lease existing between the parties, with a view of seeing whether it was intended that that watercourse should last for all time, or whether it was a temporary convenience, the construction of which is perfectly consistent with the notion that it was to be enjoyed only so long as the parties continued their relation of landlord and tenant."¹

Rights in
may be ac-
quired by
grant or pre-
scription.

Although no action will lie, by a riparian owner on the banks of an artificial watercourse, for its diversion or obstruction, merely as an incident to the property through which it passes,² yet there is no doubt that the long-continued submission of a servient owner to the discharge of water upon his tenement, or to the conducting it through his land by the owner of the dominant tenement, will confer a right to continue the discharge of water, or to continue to receive the supply of it through the land of the servient owner.³ An artificial watercourse may, moreover, have been originally made under such circumstances, and have been so used as to give all rights that a riparian proprietor would have had, had it been a natural stream.⁴ "There is no doubt," says Sir Montague Smith, delivering the judgment of the Judicial Committee of the Privy Council in a late Indian Appeal,⁵ "that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it, through an artificial watercourse constructed on his neighbour's land, do not rest on the same principles. In the former case each successive riparian proprietor is, *primâ facie*, entitled to the unimpeded flow of the water in its natural course, and to its reasonable enjoyment as it passes through his land, as a natural incident to his owner's ship of it. In the latter, any right to the flow of the water must

Rameshur
Pershad
Singh v.
Koonj Behari
Pattuk.

¹ See *ante*, pp. 216—227, 233, 234.

² *Kensit v. G. E. Rly.*, 27 Ch. D. 122; 54 L. J., Ch. 19; 51 L. T. 862. A person who makes an "artificial cutting" and so brings water to a stream which did not go there before can, *primâ facie*, cut it off if he chooses, per Romer, J., in

Brymbo Water Co. v. Lester's Lime Co., 8 R. 329, at p. 332; see *ante*, pp. 112 *et seq.*

³ Gale, p. 269.

⁴ *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 L. J., Q. B. 136.

⁵ *Rameshur Pershad Singh v. Koonj Behari Pattuk*, 4 App. Cas. 121, 126.

“ rest on some grant or arrangement, either proved or presumed,
 “ from or with the owners of the lands from which the water is
 “ artificially brought, or on some other legal origin. The above
 “ distinction seems to be now clearly established ; for, although it
 “ was said by the Court of Queen’s Bench in the case of *Magor v.*
 “ *Chadwick*,¹ that it was no misdirection to tell the jury ‘ that
 “ ‘ the law of watercourses is the same, whether natural or
 “ ‘ artificial,’ it was held in a subsequent case, which appears to
 “ their Lordships to be correctly decided—*Wood v. Waud*²—
 “ that this expression is to be considered as applicable to the
 “ particular case, and that, as a general proposition, it would
 “ be too broad ; on the other hand, it appears to their Lordships
 “ that the proposition that a right to the use of water flowing
 “ through an artificial channel cannot be presumed from the
 “ time, manner, and circumstances of its enjoyment, is equally
 “ too broad and untenable. It was said by the Court in *Wood v.*
 “ *Waud*³—‘ We entirely concur with Lord Denman, C. J., that
 “ ‘ the proposition that a watercourse of whatever antiquity,
 “ ‘ and in whatever degree enjoyed by numerous persons, cannot
 “ ‘ be enjoyed so as to confer a right to the use of the water, if
 “ ‘ proved to have been originally artificial, is quite indefensible ;’
 “ ‘ but, on the other hand, the general proposition that *under*
 “ ‘ *all circumstances*, the right to watercourses, arising from
 “ ‘ enjoyment, is the same, whether they be natural or artificial,
 “ ‘ cannot possibly be sustained. The right to artificial water-
 “ ‘ courses, as against the party creating them, surely must
 “ ‘ depend upon the character of the watercourse, whether it be
 “ ‘ of a permanent or temporary nature, and upon the circum-
 “ ‘ stances under which it is created. The enjoyment for twenty
 “ ‘ years of a stream diverted or penned up by permanent
 “ ‘ embankments, clearly stands upon a different footing from
 “ ‘ the enjoyment of a flow of water originating in the mode of
 “ ‘ occupation or alteration of a person’s property, and presum-
 “ ‘ ably of a temporary character, and liable to variations.’ In a
 “ case which occurred soon after this decision, *Greatrex v. Hay-*
 “ *ward*,⁴ Baron Parke shortly states the principle thus : ‘ The
 “ ‘ right of the party to an artificial watercourse, as against
 “ ‘ the party creating it, must depend upon the character of
 “ ‘ the watercourse and the circumstances under which it was

¹ 11 A. & E. 586.² 3 Ex. 748 ; 18 L. J., Ex. 305.³ 3 Ex. 777.⁴ 8 Ex. 293.

“ ‘created.’ In the case, then, in question, the Court considered “ ‘that the watercourse was of a temporary nature only, and that “ ‘no right had been acquired by an enjoyment of twenty years.

“ ‘In a subsequent case the Court of Queen’s Bench directed a “ ‘new trial, on the ground that the jury might have been misled “ ‘by the direction of the learned judge who tried the cause, to “ ‘the effect that if the stream were an artificial one, no right “ ‘whatever could have been acquired in it. The Court held the “ ‘direction was incorrect—‘because’ (in the words of the Court) “ ‘although it may have been an artificial watercourse, it may “ ‘still have been originally made under such circumstances, “ ‘and have been so used, as to give all the rights that the “ ‘riparian proprietors would have had, had it been a natural “ ‘stream:’ *Sutcliffe v. Booth*.”¹

Following these authorities, from which it would appear that though rights on an artificial stream are not natural rights, they may be acquired under such circumstances and have been so used as to be co-extensive with the natural rights of riparian owners, in *Roberts v. Richards*,² where a watercourse had run for over seventy years from a natural spring on plaintiff’s land through the defendant’s land, then through the plaintiff’s land to his house, the Court of Appeal has held that as no one could tell when the artificial part (if any) of the watercourse was made, the watercourse must be deemed to be a natural stream; or, if in part artificial, to have been made so as to give all the rights of a riparian proprietor to the defendant and his predecessors in title. So in *Baily v. Clark and Morland, Ltd.*,³ it has been held by Byrne, J., that the owner of a mill on an artificial stream on the evidence was entitled, subject to certain rights acquired by the riparian owner higher up the stream, to the unimpeded flow of water in the same condition and in the same volume as it entered the artificial course, both for the purposes of driving the mill and for all purposes appropriate to an inhabited tenement. Byrne, J., refers in his judgment to *Rameshwar Pershad Singh v. Koonj Behari Pattuk*,⁴ *Kensit v. Great Eastern Railway Co.*,⁵ and *Sutcliffe v. Booth*, and cites Sir Montague Smith’s judgment,

*Baily v.
Clark and
Morland.*

¹ 32 L. J., Q. B. 136; see also judgment of Cotton, L. J., in *Kensit v. G. E. Ry.*, 27 Ch. D. 122; 54 L. J. Ch. 19; 51 L. T. 862.
² 51 L. J., Ch. 944 (C. A.); 50 L. J., Ch. 297; 64 L. T. 271; see also *Frankum*

v. Falmouth, 6 Car. & P. 529; 2 A. & E. 54; 4 L. J., K. B. 26, 90.

³ (1901) 17 T. L. R. 239.

⁴ 4 App. C. 121.

⁵ 27 Ch. D. 122.

given *ante*, p. 250. The Court of Appeal¹ varied the decree granted by Byrne, J., affirming so much of it as related to pollution of the stream, but allowing the appeal as regarded the abstraction of water. Vaughan Williams, L. J., in delivering judgment, after citing Lord Kingsdown's judgment in *Miner v. Gilmour*,² as to rights on natural streams, went on to say that in the case of an artificial watercourse any right to the flow of water must depend upon some grant or prescriptive easement or arrangement, either proved or presumed from the user, by the owners of the land through which the water flowed. The basis of all rights must be agreement, express or presumed, with the owners of the land through which the artificial watercourse ran. That being so, it was plain that the circumstances might be such as to lead to the inference that the artificial channel was constructed upon the terms that all the riparian proprietors should have the same rights as riparian proprietors would have in the case of a natural stream, and no more. *Sutcliffe v. Booth*³ was an authority for this proposition. His Lordship was not certain that the ordinary rights of riparian proprietors in a natural stream would not be sufficient for the present defendants. But he thought the defendants' rights were somewhat wider. In his judgment, it was perfectly clear from the evidence of user that what had been done by the defendants in abstracting water had not been a violation of the plaintiffs' rights as a riparian proprietor on this artificial stream, because the artificial stream was constructed under such conditions that water might be abstracted for manufacturing purposes equally by all the riparian proprietors, provided that the abstraction was of reasonable amount. And he was clearly of opinion that no possible inference which could be drawn from the facts of the present case would give the plaintiff (as he had claimed) a right to every drop of water passing along the stream without any diminution whatever.⁴

The result of these authorities and of those at pp. 127—136, 161 *et seq.*, Chap. III., *ante*, seems to be that *prima facie* no riparian rights exist, *ex jure naturæ*, on artificial watercourses, but that all the rights of riparian owners may be acquired by prescription on artificial watercourses, provided such artificial watercourses are of such a permanent character and have been made under such

¹ (1902) 18 T. L. R. 364.

² 32 L. J., Q. B. 136.

³ 12 Moo. P. C. 156. See *ante*, pp. 121, 122.

⁴ See also *Blackburn v. Somers*, 5 L. R., Ir. 1.

circumstances and so used as to give the rights that a riparian proprietor would have had on a natural stream. These rights are dependent on the presumption of a lost grant. But in no case can the mere grantee of a riparian owner on a natural stream, if the grantee is not a riparian owner himself on the natural stream, have by express grant or *à fortiori* acquire by prescription any rights as against other riparians on the natural stream except his own grantor.

Diversion of natural stream by artificial means.

Where a natural stream having a natural source is diverted by artificial means without injury to the rights of others, the riparian owners who would have had rights on the natural course of the stream do not lose those natural rights from the fact that the water so diverted flows in an artificial channel.¹ Where, however, such artificial channel is carried across the lands of others, all rights to it, as between the owner through whose land it passes and the owner for whose benefit it flows, will be regulated by the laws of artificial watercourses, as stated in this chapter, and not by those regulating natural rights to water.²

Easement to discharge water.

The right to discharge water on another's land is recognized in the case of *Wright v. Williams*,³ where it was held that a right to let off water from pits impregnated with a poisonous substance upon the land of another, might be acquired by user under the Prescription Act; and in *Caukwell v. Russell*,⁴ where it was held that proof of a prescriptive right to send ordinary refuse water into another's drain would not justify the dominant owner in sending the foul water and filth from his privies into that drain, but that the right as claimed must be proved by grant or user.

Easement to receive flow of water.

The right to receive the flow of water from another's land is exemplified in the case of *Irimy v. Stocker*,⁵ where it was proved that the water of an artificial watercourse had been used from before the time of living memory by tin-bonders, according to the custom of Cornwall, which enables any person to mark out a piece of waste ground, the owner of which does not choose to

¹ *Nuttall v. Bracewell*, L. R., 2 Ex. 1; *Stockport v. Potter*, 3 H. & C. 300, see *ante*, pp. 127 *et seq.*, 161 *et seq.*; *Beeston v. Weate*, 5 E. & B. 986; see, however, *Crossley v. Lightowler*, L. R., 2 Ch. 478.

² See judgment of Cotton, L. J., in *Kensit v. G. E. Rly.*, 27 Ch. D. 122; 54 L. J., Ch. 19; 51 L. T. 862.

³ 1 M. & W. 77.

⁴ 26 L. J., Ex. 34.

⁵ L. R., 1 Ch. 396; 35 L. J., Ch. 467;

14 L. T. 427. As to custom of tin-bonding, see *Rogers on Mines*, 347; *Rogers v. Brenton*, 10 Q. B. 26, 50; *Gared v. Martyn*, 34 L. J., C. P. 353; *Rez v. Baptist Mill Co.*, 1 M. & S. 612; *Rez v. St. Austell*, 5 B. & A. 693; 24 R. R. 534; *Goodday v. Michel*, Cro. Eliz. 441; *Crease v. Saul*, 2 Q. B. 862; *Vice v. Thomas*, cited in 2 Q. B. at p. 880.

work the mines under it, and work them without the consent of the owner, yielding to the owner a share of the proceeds. In 1856 the tin-borders abandoned the mine; since which time the plaintiffs, the owners of the soil, had been in possession. A bill by the owners of the soil to restrain the diversion of this watercourse by the owner of the land on which it rose was dismissed by the Vice-Chancellor, on the ground that there was no privity of estate between the owner of the soil and the borders, and that the owner could not, therefore, claim an easement by prescription on the ground of their enjoyment of it. The Court of Appeal reversed this decision, and granted the injunction prayed, holding that from the proof of user beyond living memory of the water for the purpose of working the mines, there was an irresistible presumption, even independently of the statute 2 & 3 Will. IV. c. 71, that the owners of the mines had, either by prescription or grant, acquired a right to the easement claimed, and that this presumption was not rebutted by the fact that the mines had been worked by the tin-borders.

In the Irish case of *Powell v. Butler*,¹ it was held that where plaintiff had for twenty years used an artificial watercourse, made for the benefit of all the persons by or through whose land the water was caused to flow, he had acquired a right to the flow of it from and through defendant's lands above, and could maintain an action for the diversion of it.

"A question of much greater difficulty," says Mr. Gale, "arises in the case of a discharge of water when the servient owner seeks to compel the dominant owner to continue it, and to prevent him from altering its course, and thus attempts to invert their relative positions, and himself to become dominant. The chief objection is, that there is no submission (*patientia*) by the dominant owner to the enjoyment of the water by the servient,—he discharges the water for his own convenience, and to what use the other may apply it when so discharged is immaterial to him,—he has no means of preventing such an application but by discontinuing the discharge, and thus depriving himself of the use of his own easement. Supposing it to be unknown by which party the flow of water was caused, and that the flow is beneficial to the owners of both tenements,—to the one by the discharge—to the other by the use

Right of servient owner to compel dominant owner to continue discharge of water,

¹ Ir. R., 5 C. L. 309.

“to which he puts the water on receiving it,—it would probably
“be presumed that a reciprocal easement did exist.”¹

and rights on
artificial
watercourses
generally.

This question has been elaborately discussed in a series of considered judgments, and as the point is a most important one, involving a consideration of the whole law of artificial watercourses, it will be well to discuss the various cases at some length.

*Gared v.
Martyn.*

In the case of *Gared v. Martyn*,² an action was brought for obstructing the plaintiff, the occupier of certain clay works, in his right to certain artificial watercourses. The first watercourse had been made originally by his predecessor in title with the licence of the proprietor of land on a natural stream from which the water was derived, and the Court held that this was not such an enjoyment as of right as to entitle him to claim a prescriptive right to its flow from an uninterrupted user of twenty years.³ The second watercourse had been made by plaintiff in defendant's land, and had been enjoyed, adversely, for twenty years. The Court held he was entitled to sue for the interruption of it, and that his right was not destroyed by the fact that the land in which the water had its source was, by the custom of Cornwall, subject to the rights of tin-bounders to use the water, if they chose, for until they chose to exercise their rights, the general law of the land applied to Cornwall as to any other county. The third watercourse was made by miners, under whom the defendant claimed for the purpose of draining their mines; and the Court held that the evidence showed that the miners had not abandoned their control of the stream, and that, therefore, no rights could be acquired over it by prescription.

The law with regard to artificial watercourses is thus stated by Erle, C. J., delivering the opinion of the Court of Common Pleas. “Rights and liabilities in respect of artificial streams, when first flowing on the surface, are entirely distinct from rights and liabilities in respect of natural streams so flowing. The water in an artificial stream flowing in the land of the party by whom it was caused to flow, is the property of that party, and is not subject to any rights or liabilities in respect of other persons. If the stream so brought to the surface is made to flow upon the land of a neighbour without his consent, it is a wrong for which the party causing it so to flow is liable. If

¹ Gale on Easements, p. 269.

² 34 L. J., C. P. 353; 13 L. T. 74; 19 C. B., N. S. 732; 14 W. R. 62.

³ Cf. *Chamber Colliery v. Hopwood*, ante, p. 249.

“there is a grant by the neighbour, the terms of the grant regulate the rights and liabilities of the parties thereto. If there is uninterrupted user of the land of the neighbour for receiving the flow as of right for twenty years, such user is evidence that the land, from which the water is sent into the neighbour’s land, has become the dominant tenement, having a right to the easement of so sending the water, and that the neighbour’s land has become subject to the easement of receiving that water. But such user of the easement of sending on the water of an artificial stream, is, of itself, no evidence that the land from which the water is sent has become subject to the servitude of being bound to send on the water to the land of the neighbour below. The enjoyment of the easement is, of itself, no evidence that the party enjoying it has become subject to the servitude of being bound to exercise the easement for the benefit of the neighbour. A right of way is no evidence that the party entitled thereto is under a duty to walk; nor a right to eaves-dropping on the neighbour’s land, that the party is bound to send on his rain-water to that land. In like manner, we consider that a party by the mere exercise of a right to make an artificial drain into his neighbour’s land, either from mine or surface, does not raise any presumption that he is subject to any duty to continue his artificial drain, though there may be additional circumstances by which that presumption would be raised or the right proved. Also if it be proved that the stream was originally intended to have a permanent flow, or if the party by whom or on whose behalf the artificial stream was caused to flow is shown to have abandoned permanently, without intention to resume the works by which the flow has ceased and given up all rights to and control over the stream, such stream may become subject to the laws relating to natural streams. The law relating to natural streams is entirely different. The flow of a natural stream creates natural rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality. These natural rights and liabilities may be altered by grant or by user of an easement to alter the stream, as by diverting or fouling or penning back, or the like. If the

“stream flows at its source by the operation of nature—that is, if it is a natural stream, the rights and liabilities of the party owning land at its source are the same as those of the proprietors in the course below. If the stream flows at its source by the operation of man—that is, if it is an artificial stream, the owner of the land at its source or the commencement of its flow, is not subject to any rights or liabilities towards any other person in respect of the water of the stream. The owner of such land may make himself liable to duties in respect of such water by grant or contract; but the party claiming a right to compel performance of those duties must give evidence of such rights beyond the mere suffering by him of the servitude of receiving such water.”

*Mason v.
Shrewsbury
Railway.*

In the case of *Mason v. Shrewsbury Railway*,¹ Cockburn, C. J., states his opinion, that in no case can the owner of a servient tenement acquire, by the mere existence of the easement, a right as against the owner of the dominant tenement to continue the diversion of a stream. “Now it is of the essence of such an easement,” he says, “that it exists for the benefit of the dominant tenement alone. Being in its very nature a right created for the benefit of the dominant owner, its exercise by him cannot operate to create a new right for the benefit of the servient owner. Like any other right, its exercise may be discontinued, if it becomes onerous, or ceases to be beneficial to the party entitled. An easement like the present, while it subjects the owner of the servient tenement to disadvantage, by taking from him the use of the water, for the watering of his cattle, the irrigation of his land, the turning of his mill or other beneficial use to which water may be applied, may, on the other hand, no doubt, be attended incidentally with equal or greater advantage to him—as, for instance, by rendering him safe from the danger of inundation. But this will give him no right to insist on the exercise of the easement on the part of the dominant owner, if the latter finds it expedient to abandon his right. In like manner where the easement consists in the right to discharge water over the land of another, though the water may be advantageous to the servient tenement, the owner of the latter cannot acquire a right to have it discharged on to his land, if the dominant owner

¹ L. R., 6 Q. B. 578; 40 L. J., Q. B. 293; 25 L. T. 239; see *Staffordshire Canal v. Birmingham*, L. R., 1 H. L. 254; and *post*, pp. 297 *et seq.*

“chooses to send the water elsewhere, or apply it to other purposes. And upon this principle, as it appears to me, might the case of *Wood v. Waud* have been decided without reference to the Prescription Act (2 & 3 Will. IV. c. 71), or to the question as to whether there had been enjoyment ‘as of right,’ so as to satisfy that statute. I prefer to rest my judgment on the principle—as it appears to me, a fundamental one—that an easement exists for the benefit of the dominant owner alone, and that the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment.”¹

In *Arkwright v. Gell*,² the plaintiffs were owners of certain cotton mills erected in 1772, and worked by the united force of a natural stream, and of an artificial sough which had been made previous to that date by a mining company, for the purpose of draining their mines. Subsequently another sough was made at a lower level, by another mining company, of whom the defendants were the representatives, by the permission of the owners of the mines, by whom the former sough was made. The effect of this second sough was, in 1836, to drain away and divert the water from the first made sough, to the injury of the plaintiff’s mills. The Court held, that the defendants were in the same position in respect to the diversion of the water, as if they had been the owners of the mine drained by the first sough, and were proceeding to unwater a further portion of their mine by a new sough; and that as the stream was not a natural watercourse, but an artificial one of a temporary character, having its continuance only whilst the convenience of the mine owners required it, and made with the sole object of getting rid of a nuisance to the mines, and as, moreover, the plaintiff was aware of the temporary character of the watercourse, he had acquired no right of action for the diversion of it.

Arkwright v. Gell.

In the case of *Magor v. Chadwick*,³ the plaintiffs complained of the pollution of a stream running to their brewery. This stream flowed from the mouth of an adit or underground passage in adjoining lands not belonging to the plaintiffs, which had been originally made more than fifty years ago by the owner of a mine for the purpose of draining it—but the mine had not been worked for thirty years. After the working had been discontinued,

Magor v. Chadwick.

¹ Cf. per Erle, C. J., in *Gared v. Martyn*, 19 C. B., N. S. 732.

² 6 M. & W. 1017; 8 L. J., Ex. 261; 2 H. & H. 17.

³ 11 A. & E. 571; 9 L. J., Q. B. 159; see remarks of Erle, C. J., on this case in *Gared v. Martyn*, 19 C. B., N. S. 732; *ante*, p. 256.

the plaintiffs had used for twenty years pure water from the adit for brewing. The defendants, owners of other mines, subsequently used the adit for draining their mines, and so made the water foul and unfit for brewing. The learned judge at the trial told the jury that, in the absence of custom, artificial water-courses were not distinguished in law from natural; that the same rules of law applied to them; and that twenty years' enjoyment might warrant them in finding in favour of the right. The jury found for plaintiff, and the Court of Queen's Bench refused to grant a new trial, holding that there was no misdirection by the learned judge.

Wood v.
Waud.

In the case of *Wood v. Waud*,¹ the Court of Exchequer laid down in an elaborate judgment the law affecting artificial water-courses, and the rights of riparian owners thereon. In that case, the waters from the workings of a colliery (partly pumped up and partly caused by the overflow of an old coal pit which had become filled with water) had for more than twenty years flowed through two artificial subterraneous channels, one of which, called the Bowling Sough, passed directly through the plaintiff's land; the other, called Low Moor Sough, passed into a natural stream called the Bowling Beck, which, so augmented, passed through the plaintiff's land. Plaintiff had used the water of the soughs for about ten years. The defendant having works on the banks of each channel above the points where they respectively arrived at the plaintiff's land, and at the Bowling Sough, diverted the water of each of them. The channels were subterraneous; but the Court determined the question as it would have done if they had been surface streams, and held that the plaintiff could not recover for the diversion. "This question," says Pollock, C. B., delivering the judgment of the Court, "is not with respect to the rights of the plaintiffs as against the owners of the collieries which the soughs relieve from water, but as to the rights of the plaintiffs and defendants *inter se*; and it will be better to consider, in the first place, how they would stand if the streams were not underground. With respect to a claim of right as against the colliery owners, if it be true that a right was gained to these streams by the riparian proprietors as against them, in consequence of their acquiescence for twenty years, by virtue of the presumption of a grant, or of Lord Tenterden's Act (2 & 3 Will. IV. c. 71), there would be

¹ 3 Ex. 748; 18 L. J., Ex. 305.

“no difficulty as to the right of the riparian proprietors against each other, or against other persons. But Mr. Cowling admitted that a grant could not be presumed, and that he should have great difficulty in establishing the right under Lord Tenterden’s Act. This Court, as then constituted, much considered that subject in the case of *Arkwright v. Gell*. We have again considered it, and are satisfied that the principles laid down, as governing that case, are correct, and were properly acted upon in it, by deciding that no action lay for an injury by the diversion of an artificial watercourse, where, from the nature of the case, it was obvious that the enjoyment of it depended upon temporary circumstances, and was not of a permanent character, and where the interruption was by the party who stood in the situation of the grantor. The Court of Queen’s Bench, in the subsequent case of *Magor v. Chadwick*, supported a verdict for the plaintiff, for the disturbance of a right to the enjoyment of a stream, under circumstances somewhat similar; but in that case the action was not brought against the party in whose land the artificial watercourse commenced, nor any one claiming under him; and he had not put an end to it by altering the mode of working of his mines, but what is more important, the action was not brought for abstracting, but for fouling—a species of injury which does not stand on the same footing; for though the possessor of the mine might stop the stream, it does not follow that he or any other could pollute it whilst it continued to run; and besides, from the course which the cause took at *Nisi Prius*, the precise question which we have now to consider does not appear to have called for decision. The two cases are therefore distinguishable, and the expressions used by the learned judges in that case, as to the similarity of natural and artificial streams, are to be understood as applicable to that particular case. We entirely agree with Lord Denman, C. J. (in *Magor v. Chadwick*), that the proposition that a watercourse, of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible;¹ but, on the other hand, the general proposition, that, under all circumstances, the right to watercourses arising from enjoyment

¹ See *Greatrex v. Hayward*, 8 Ex. 291; *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 L. J., Q. B. 136.

“is the same, whether they be natural or artificial, cannot possibly be sustained. The right to artificial watercourses against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it was created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments, clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation or alteration of a person’s property, and presumably of a temporary character, and liable to variation.

“The flow of water for twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered, so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements for twenty years could not give a right to the neighbour, so as to preclude the proprietor from altering the level of his drains for the greater improvement of his land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right.”¹

Burrows v. Lang.

In *Burrows v. Lang*² it has been held by Farwell, J., following *Arkwright v. Gell*,³ that a watercourse constructed solely for the purposes of a mill was for a temporary purpose, and that where the owner of an ancient mill and a farm the cattle whereof were to some extent watered at an ancient watercourse diverted from a natural stream, and running on the mill property alongside the farm, but constructed and maintained solely for the purpose of the mill, conveyed the farm to a purchaser without mentioning any water right, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the purchaser had acquired no right, either by implied grant or under the general words of the Conveyancing Act, 1881, s. 6, to have it continued for his benefit, and the watercourse being therefore precarious, he could have no right to the use of the water (if any) therein.

¹ See *Greatrex v. Hayward*, 8 Ex. 291; *Sutcliffe v. Booth*, 9 Jur., N. S. 1037; 32 L. J. Q. B. 136.

² (1901) 2 Ch. 503; see also *Bir-*

mingham, Dudley and District Banking Co. v. Ross, 38 Ch. D. 295.

³ *Ante*, p. 259.

Referring to *Watts v. Kelson*,¹ Farwell, J., says:² "*Watts v. Kelson*, on which the plaintiff relied, is not really in point, because the whole of the basis on which I rest my judgment was absent in that case. There was no question of an artificial watercourse having been made for one property only. The artificial watercourse in that case was made for the express purpose of providing both the properties with water. The question raised in the present case was not argued; the point did not arise; the only point was whether a quasi-easement, which would by its nature have been an easement if there had not been common ownership, passed by the grant, and it was held that it did. In the present case that is entirely excluded, because I hold that there was no quasi-easement which could pass by the grant, by reason of its precarious nature. The result is that the plaintiff's case wholly fails, and I can do nothing but dismiss it with costs." His Lordship also cites the judgment of Sir Montague Smith, in *Rameshwar Pershad Singh v. Koonj Behari Pattuk*:³ "There is no doubt that the right to the water of a river flowing in a natural channel through a man's land, and the right to water flowing to it through an artificial watercourse constructed on his neighbour's land, do not rest on the same principle;" and he adds, "I venture to add to that—the right to water flowing through an artificial watercourse constructed on a man's own land passing by his neighbour's land does not rest on the same principle as that of water flowing in a natural channel by his neighbour's land. Regarded as a question of prescription," he continues, "I should have to consider whether the artificial watercourse was made for a temporary purpose or not. The plaintiff contends that this was not a temporary purpose. That depends on the meaning of the word temporary. In *Arkwright v. Gell*⁴ the fact that water pumped from mines had flowed over a man's land for upwards of sixty years gave him no right to a continuance of the flow. The meaning of 'temporary purpose,' is, therefore, not confined to a purpose that happens to last in fact for a few years only, but includes a purpose which is temporary in the sense that it may within the reasonable contemplation of the parties come to an end."

¹ L. R., 6 Ch. 166; *ante*, p. 221.

² (1901) 2 Ch. at p. 512.

³ 4 App. Cas. 126; *ante*, p. 250.

⁴ 5 M. & W. 203, 232.

In *Brymbo Water Co. v. Lester's Lime Co.*,¹ it was held that the fact that an embankment is occasionally out of repair during a term of years, or too low when the water is high (e.g., in a flood), and so allows water to overflow into other land, gives the owner of that other land no prescriptive right to the overflow.

Pollution of
artificial
watercourses.

With regard to the question of pollution, the law would appear to be somewhat different from that with regard to diversion. In the cases of *Magor v. Chadwick*² and *Wood v. Waud*,³ the Courts were of opinion that even in cases where from the circumstances a riparian owner may have no right to compel the continuance of an artificial watercourse, he may have a right to prevent the pollution of it while it continues to run, on the ground that no man can have a right to send dirty water on another's land, unless he can prove a prescriptive right so to send dirty water.⁴

These opinions have been fully confirmed by the Court of Appeal in the late case of *Ballard v. Tomlinson*,⁵ where the Court, in an action by a landowner for the pollution of percolating water, laid down broadly that no one has a right to use his own land in such a way as to be a nuisance to his neighbour, and therefore, if a man puts filth or poisonous matter on his land he must take care that it does not escape so as to poison water which his neighbour has a right to use, although this neighbour may have no property in such water at the time it is fouled.⁶

Easement of
drip.

The right to discharge rain-water from the roof of a house, either by means of a spout, or by drip, which is a nuisance in the absence of a prescriptive right, may be acquired by user, and is not destroyed by a mere alteration in the height of the eaves not increasing the burthen on the servient tenement.⁷ No corresponding right to the flow of rain-water from the roof of a house can be acquired by prescription.⁸

Extinguishment of Easements of Water.

"The modes by which easements may be lost," says Gale,⁹ "correspond with those already laid down for their acquisition.

¹ (1894) 8 R. 329.

² 11 A. & E. 571; *ante*, p. 259.

³ 3 Ex. 748; see also *Sutcliffe v. Booth*, 32 L. J., Q. B. 136.

⁴ As to this, see *Cawkwell v. Russell*, 26 L. J., Ex. 34.

⁵ 29 Ch. D. 115; 54 L. J., Ch. 404; 52 L. T. 942; *ante*, p. 201.

⁶ See *ante*, pp. 162 *et seq.*, where this

question is discussed.

⁷ *Harvey v. Walters*, L. R., 8 C. P. 162; *Thomas v. Thomas*, 2 C., M. & R. 34; 41 R. R. 678; see Gale on Easements, pp. 251, 487, 505; and *ante*, Chap. III., p. 143.

⁸ *Wood v. Waud*, *supra*; *Greatrex v. Hayward*, 8 Ex. 291.

⁹ Gale on Easements, p. 482.

"1. Corresponding to the express grant is the express renunciation. 2. To the disposition by the owner of two tenements, the merger by the union of them. 3. To the easement of necessity, the permission to do some act which of necessity destroys it. 4. And to the acquisition by prescription, abandonment of user."¹

An express release at law to be effectual must be by deed, but in equity an easement may be lost by agreement or acquiescence.² By express release.

Easements are also extinguished by operation of law if the seisin of the dominant and servient tenements are united in one and the same person.³ Unity of possession only suspends an easement—it requires unity of seisin to destroy it.⁴ By merger.

A natural right to water coming from another tenement is not destroyed by unity. "There is a difference," says Whitelock, J., in *Sury v. Piggott*,⁵ "between a way or common and a water-course. These begin by private right, by prescription, by assent as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity; because the greater benefit shall drown the less. A water-course doth begin *ex jure nature*, having taken this course naturally, and cannot be averted."⁶

It has already been stated, that a licence by the dominant owner to do an act incompatible with the existence of an easement, may work its extinguishment, even when the licence is by parol.⁷ By licence.

When a prescriptive right is once acquired it cannot be lost by any subsequent act not amounting to a surrender, even though such act would have, previous to the acquisition of such right, rendered the user precarious.⁸ Abandonment of enjoyment.

¹ Where an easement is granted for a particular purpose by Act of Parliament, the easement ceases when the particular purpose is accomplished. Thus, where a canal company, who had a right to take water for a canal, were reconstituted a railway company by Act of Parliament, it was held that they could not grant away their right to the water, for as they had ceased to require it for their canal, the right to take it ceased: *National Manure Co. v. Donald*, 4 H. & N. 8; 28 L. J., Ex. 185.

² Gale on Easements, p. 482; Goddard on Easements, 5th ed., 1896, pp. 537, 552; see *Fisher v. Moon*, 11 L. T., N. S. 623; *Waterlow v. Bacon*, L. R., 2 Eq. 514; *Johnson v. Wyatt*, 9 Jur., N. S. 1334; *Davies v. Marshall*, 10 C. B., N. S. 697;

Soloman v. Glorer, 10 W. N. 117; and *ante*, pp. 206, 207.

³ Goddard on Easements, pp. 529, 534; Gale, pp. 15, 160, 486; see *ante*, pp. 217 *et seq.*

⁴ *Thomas v. Thomas*, 2 C., M. & R. 34; 41 R. R. 678; *Simper v. Foley*, 2 John. & H. 555; *James v. Plant*, 4 A. & E. 761; 43 R. R. 465; Co. Litt. 313 a.

⁵ 3 Bulst. 339; Poph. Rep. 166.

⁶ See *Bright v. Walker*, 1 C., M. & R. 219; 40 R. R. 536; and Goddard on Easements, p. 524.

⁷ *Ante*, p. 209.

⁸ *French Hoek Commissioners v. Hugo*, 10 App. Cas. 336; 54 L. T. 92; see also *Bredu v. Silberbauer*, L. R., 3 P. C. 84.

By nonuser.

The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right, without some evidence of an intention to abandon it; but a long-continued suspension may render it necessary for the person claiming the right to show that some indication was given during the period that he ceased to use the right of his intention to preserve it.¹ Thus where the owner of an old pond had an acquired right to draw water for it from a well, and had disused the old pond for forty years, and during that time drew water for three new ponds; it was held that the right to draw water to the old pond was not destroyed, as it was impossible to conceive that he intended to abandon the right, when he was actually drawing water into three new ponds instead of into the old one.² So a right of way along a stream has been held not to be lost if the owner allows part of it to be choked with mud, even though it may be impassable for sixteen years; for the mud may be removed if the way is required.³

In *Tilbury v. Silva*,⁴ Kay, J., held that the abandonment by a holder of copyhold lands of a right claimed to fish in the waters of the manor for four years before action brought, was a bar to that right under sect. 4 of 2 & 3 Will. IV. c. 71.

Interruptions, though not acquiesced in for a year, may show that the enjoyment never was of right but contentious throughout, though if once the enjoyment as of right has begun, no interruption for less than a year can defeat it.⁵

By alteration
of dominant
tenement.

Where the dominant tenement is altered in such a way as will make it "incapable any longer of the perception of the particular "easement," or where the alterations are of such a permanent character as will evince an intention on the part of the dominant owner to abandon it, the easement will be extinguished, although the abandonment has not existed for twenty years. Thus, in *Crossley v. Lightowler*,⁶ where the owners of dye works had a privilege or easement of pouring foul dye water into a river, it was held, that though the mere nonuser of this easement was not in itself a proof of abandonment of it, without some evidence of intention to abandon it, yet the nonuser of the mills for twenty

¹ *Crossley v. Lightowler*, L. R., 2 Ch. 478; 3 Eq. 279.

² *Hale v. Olroyd*, 14 M. & W. 789. See per Wood, V.-C., in *Crossley v. Lightowler*, L. R., 3 Eq. p. 293.

³ *Bower v. Hill*, 1 Bing. N. C. 549; 41 R. R. 630.

⁴ 45 Ch. D. 98; 62 L. T. 254, *post*, Chap. VI.

⁵ *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 26; 20 L. J., Q. B. 482.

⁶ L. R., 2 Ch. 478; L. R., 3 Eq. 279; see *Reg. v. Chorley*, 12 Q. B. 518; *Ward v. Ward*, 7 Ex. 838; *Mason v. Hill*, 5 B. & Ad. at p. 16; 39 R. R. 354; *Liggins v. Inge*, 7 Bing. 693; 33 R. R. 615.

years, and the fact that they had been allowed to go to ruin, was sufficient to destroy the right.

An encroachment by the dominant owner, which will render the easement necessarily more onerous to the servient tenement, will have the effect of destroying the easement;¹ but a mere alteration, causing no injury to the servient heritage, will not destroy the right.²

By encroachment.

Thus, in *Cawkwell v. Russell*,³ where the plaintiff had a prescriptive right to send waste water down the defendant's drain, and sent down also foul water from his privies, the Court held that defendant had a right to stop the whole drain, as the encroachment could not be prevented in any other way; but in the subsequent case of *Hill v. Cock*,⁴ where the plaintiff increased a prescriptive right to water by lengthening a gutter, the defendant was not held justified in stopping this extensive user, by means which altogether prevented plaintiff's enjoyment of the water.

¹ *Bealey v. Shaw*, 6 East, 208; 8 R. R. 466; *Brown v. Best*, 1 Wils. 174; *Crossley v. Lightowler*, L. R., 2 Ch. 478; *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Kingston*, 13 W. R. 888.

² *Luttrel's case*, 4 Rep. 86; *Hall v. Swift*, 6 Scott, 167; 44 R. R. 728; and

cases cited *ante*, pp. 242—248; *Harrey v. Walters*, L. R., 8 C. P. 62; *Thomas v. Thomas*, 2 C., M. & R. 34; 41 R. R. 678.

³ 26 L. J., Ex. 314.

⁴ 26 L. T., N. S. 185; see *post*, Chap. X.

CHAPTER V.

OF CANALS, WATER SUPPLY, AND DOCKS.

It is proposed in the present chapter to treat of the rights, duties and liabilities of—I. *Canal Companies*; II. *Water Companies*; and III. *Dock Companies*.

These bodies are but substitutes for individual enterprise.

All such bodies are either combinations of adventurers incorporated under Acts of Parliament in order to supply a public want for their own profit, or are public bodies invested with the like powers for the public benefit. In both cases, however, they are but substitutes for individual enterprise.

"It is well observed," says Blackburn, J.,¹ "by Mr. Justice Mellor in *Coe v. Wise*,² of corporations like the present, formed "for trading and other profitable purposes, that though such "corporations may act without reward to themselves, yet in "their very nature, they are substitutions on a large scale for "individual enterprise. And we think that, in the absence of "anything in the statutes (which create such corporations) "showing a contrary intention in the legislature, the true rule "of construction is that the legislature intended that the liability "of corporations thus substituted for individuals should, to the "extent of their corporate funds, be co-extensive with that "imposed by the general law on the owners of similar works. "If, indeed, the legislature has by express enactment or necessary intendment enacted that they shall not be subject to such "a liability, there is an end of the question."

Rights and duties of bodies exercising statutory powers.

Since these bodies are almost universally incorporated by Act of Parliament, and derive all their powers to interfere with the rights of private property from the special enactment creating them, it will be well to note some of the general principles regulating the liability of companies exercising statutory powers.

Where the legislature has authorized certain persons to effect a certain purpose, and has given them the powers necessary to

¹ Delivering the opinion of the judges in the House of Lords in *Mersey Docks Co. v. Gibb*, L. R., 1 H. L. 93; 11 H. L.

Cas. 686.

² 5 Best & Sm. 440; 4 New Rep. 354.

effect it, they may exercise those powers to their full extent without incurring responsibility, but in so doing they must not occasion any needless injury to any one.¹

Where persons are incorporated by Act of Parliament for a particular purpose, and have full powers given them to effect that purpose, if the effecting of it may occasion (not only in the course of originally extending the necessary works for the required purposes, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury.¹

These principles were laid down in the case of *Geddis v. Bann Reservoir*,² which was an appeal heard in the House of Lords against a judgment of the Exchequer Chamber in Ireland, reversing a previous judgment of the Court of Queen's Bench there.

*Geddis v.
Bann Reservoir.*

A local Act of Parliament incorporated certain persons for the purpose of securing a regular and proper supply of water to mill-owners whose works were situated on the banks of the river Bann. These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the Bann through the channel of a stream called the Muddock. The second clause of the Act directed them to "make, erect, construct, maintain, "repair and keep" by means of a reservoir a due and adequate supply of water for the river Bann at all seasons of the year; and to enter on the lands of the different streams named, to do what was necessary for the conveyance and due regulations of the supply of such waters, and "to make, erect, alter, maintain, "repair, widen, deepen, scour, cleanse, and keep proper and "sufficient conduits, aqueducts, channels and watercourses, drains, "feeders, weirs, dams," &c., &c. The 82nd clause gave similar directions, and ordered that the surplus water should be returned unto the different streams from which it had been taken; and also made provisions for supplying with water the cattle depasturing in the fields there.

The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, and sent them

¹ *Geddis v. Bann Reservoir*, 3 App. Cas. 430, H. L. Ir.; see also *Evans v. Manchester S. and L. Rail. Co.*, 36 Ch. D.

626; *Green v. Chelsea Waterworks Co.*, 70 L. T. 541, and cases *ante*, p. 150.

² 3 App. Cas. 430.

through the channel of the Muddock, so that at times it overflowed its banks, and did damage to the lands of the adjoining proprietors.

It was held that the order of the Exchequer Chamber should be reversed, and the order of the Court of Queen's Bench restored, and that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the Act should not be injurious to the lands lying along the banks of the Muddock, and that the bed or channel of the Muddock must be cleansed and kept in a proper state for the flow and re-flow of the water that had to pass through it.

In giving judgment, their Lordships distinguished the case from that of *Cracknell v. Mayor and Corporation of Thetford*,¹ which had been cited for the defendants. "In that case," said Lord Hatherley,² "which has been followed by several others, "it seems to have been laid down that persons having powers to "execute certain works, and executing those works in such a "manner as to perform that duty in compliance with an Act "of Parliament, and being utterly guiltless of any negligence, "cannot be liable to an action. If the person injuriously "affected cannot find any clause in the Act of Parliament giving "him compensation for the damage which he has received, he "cannot obtain compensation for that damage by way of action "against the parties who have done no wrong—that is the "simple proposition which is laid down in that case, and when "it is expressed in these terms it is impossible for anybody to "find any fault with it. As my noble and learned friend (Lord "Selborne) has observed, there are other cases far more like this "case than that of *The Corporation of Thetford*. In the *Thetford case*³ what occurred was this: there was a power to "a company to facilitate the navigation of a river by means "of making certain alterations and improvements in it; a part "of the necessary alterations was the placing of stanchions in "the river. When the river was altered and improved, weeds "grew up in it with which the company had nothing to do; "they grew up neither more nor less by reason of anything "the company had done. It was said that the silting up of "the river had been increased by means of those stanchions,

¹ L. R., 4 C. P. 629; 38 L. J., C. P. 353; see *post*, Chap. VII.

² 3 App. Cas. p. 448.

³ L. R., 4 C. P. 629.

"but they were necessary to the works and could not be
 "removed; but nothing had been of its own accord done by
 "the company which could be said to be the cause of the injury
 "the plaintiff had sustained. Now in this case we have this
 "state of things. The respondents have the power to execute
 "a work of this description, and to make channels and cuts,
 "and not only so, but they have also the power to widen and
 "deepen cuts and watercourses. Having that power, and having
 "the power of using those watercourses to communicate between
 "the reservoir and the river Bann, they have chosen to exercise
 "that power in a manner injurious to the plaintiff owing
 "to their not having seen, in the first instance, the necessity
 "of making provision for the additional quantities of water
 "that would be sent down, and at the varying periods at
 "which they would be sent down. The defendants neglected
 "to make the provision they should have made for carrying
 "that water off in such a manner as would have prevented the
 "occurrence to the plaintiff of a damage which never had
 "occurred to him before, and which was, as the jury found,
 "attributable to the works so executed. This case is not within
 "the principle of the *Thetford case*,¹ nor within any principle
 "which could be laid down with regard to parties keeping them-
 "selves entirely within their powers, and taking care that the
 "powers of an Act of Parliament when exercised shall be
 "exercised in a manner to prevent needless injury. We are
 "not bound nor entitled to suppose that they will wilfully do
 "injury by the exercise of the legislative powers which have
 "been given to them; but it appears to me clearly and plainly
 "that they should use every precaution, by the exercise either
 "of the powers created by the Act of Parliament itself, or of
 "their common law powers, to prevent damage and injury
 "being done to others, through whose property the works or
 "operations are to be carried on, and to avoid subjecting them
 "to consequences which they were not bound to anticipate from
 "the Act of Parliament, seeing that the Act also enabled the
 "parties who had the power to do so to prevent the mischief."

Lord Blackburn in the course of his judgment made the
 following remarks:² "It is agreed on all sides that the Act
 "requires the promoters, the defendants, to pour into the
 "channel of the river Muddock as much water as, on the

¹ L. R., 4 C. P. 629.

² 3 App. Cas. 455.

“average, used formerly to go. It does not mean that if it happens to be a high flood they are to keep it up to a high flood, or that in summer they are to keep it to a mere trickle if it was a mere trickle before; but it means that on the average it is to be as much as it was before. And they have a permissive power, for the benefit of the mill-owners on the Bann, to send down more water, both greater in quantity and in a different way from what would have gone in the ordinary natural state of things down the Muddock if the Act had not been passed. Now, certainly, the result has been that the channel of the Muddock, as it exists at present, is not able to carry off the water they have put into it, and if they have no power to cleanse the channel of the Muddock or to alter it, which was the view taken by the majority of the learned judges in the Court of Exchequer Chamber below, then they are not liable to damages for doing that which the Act of Parliament authorizes, namely, pouring part of the water of the reservoir into the Muddock that it may go into the Bann. For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the legislature has authorized, if it be done negligently. And, I think, that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented, it is within this rule ‘negligence’ not to make such reasonable exercise of their powers. I do not think that it will be found that any of the cases (I do not cite them) are in conflict with that view of the law.” His Lordship then went on to state, that the question, therefore, depended on whether power was given under the Act to the promoters to cleanse the Muddock, and that he was of opinion that such power was so given by the provisions of the second section, and that the defendants were guilty of negligence in not cleansing it.

The principles above laid down are but an affirmation of those enunciated in earlier cases.

Allnutt v. Inglis.

Thus in *Allnutt v. Inglis*,¹ which turned on the rights of the London Dock Company, Lord Ellenborough stated the rule, that where private property is, by consent of the owner, invested

¹ 12 East, 527; 11 R. R. 482.

with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public, in the exercise of that public interest or privilege conferred for their benefit;¹ and this important general principle was confirmed and extended in the case of *The Mersey Dock Trustees v. Gibb*,² *Mersey Dock v. Gibb.* which turned on the liability of the plaintiffs for injuries caused by the negligence of their *employés*; and where it was decided, not only that a private person or a company, having a right to levy tolls in respect of the performance of a particular work, will be liable in damages for injuries occasioned by performing it negligently, but also that a corporate body, authorized to perform such a work, and receiving tolls in respect of it, though obtaining no profit for itself from such tolls, but collecting them for the maintenance of the work, and the possible future benefit of the public, is equally responsible for injuries arising from the improper performance of such work, and the funds thus obtained must discharge that liability. On the appeal to the House of Lords, certain questions relative to the points raised in this case were put to the judges by the Lord Chancellor, and it will be well to quote, in illustration of this subject, some of the remarks of Mr. Justice Blackburn, who delivered their opinion in reply. After approving the doctrine laid down in *Parnaby v. Lancaster Canal*,³ and pointing out the distinction between dock trustees and a canal company, he continued: "If the legislature directs
 "or authorizes the doing of a particular thing, the doing of it
 "cannot be wrongful; if damage results from the doing of that
 "thing, it is just and proper that compensation should be made
 "for it, and that is generally provided in the statutes authorizing
 "the doing of such things. But no action lies for what is
 "*damnum sine injuriâ*; the remedy is to apply for compensation
 "under the provisions of the statutes legalizing what would
 "otherwise be a wrong. This, however, is the case, whether the
 "thing is authorized for a public purpose or private profit. No
 "action will lie against railway companies for erecting a line of
 "railway authorized by their Acts, so long as they pursue the
 "authority given them, any more than it would lie against the
 "trustees of a turnpike road for making their road under their

¹ *Allnutt v. Inglis*, 12 East, 527; 11 35 L. J., Ex. 225; 14 L. T. 677.
 R. R. 482. ² 11 Ad. & El. 223; see *post*, p. 308.

³ L. R., 1 H. L. 93; 11 H. L. Cas. 686;

"Acts, though one road is made for the profit of the shareholders in the company, and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the legislature (*The King v. Pease*).¹ This, we think, is the point decided in *The Governors of the British Cast Plate Manufacturers v. Meredith*,² *Sutton v. Clarke*,³ and several other cases, as is well explained by Mr. Justice Williams in *Whitehouse v. Fellowes*.⁴

"But though the legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage shall be done." In *Brine v. The Great Western Rail. Co.*,⁵ Mr. Justice Crompton says, "The distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains."⁶ The learned judge pointed out that this distinction is as applicable to works executed for one purpose as another. "It is pointed out by Lord Campbell in *The Southampton Itchin Bridge v. The Southampton Local Board of Health*⁷ that in every case the liability of a body, created by statute, must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statute is that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care and use reasonable skill, that the works are such as the statute authorizes, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them; there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil that duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute."⁸ The House of Lords gave judgment in accordance with this opinion of the judges.

¹ 4 B. & A. 30; 38 R. R. 207.

² 4 T. R. 794.

³ 6 Taunt. 29; 16 R. R. 563.

⁴ 10 C. B., N. S. 765.

⁵ 2 Best & Sm. 402, 411.

⁶ *Leader v. Moxon*, 3 Wils. 461; 2

Sir W. Bl. 424; *Sutton v. Clarke*, 6 Taunt. 29; 16 R. R. 563; *Jones v. Bird*, 5 B. & Ald. 837; 24 R. R. 579; see 11 H. L. Cas. 714.

⁷ 8 Ell. & Bl. 901—812.

⁸ See *Ward v. Lee*, 7 Ell. & Bl. 426;

We shall now proceed to notice in detail some of the principal points of the law relating to—I. *Canals* ; II. *Water Supply* ; and III. *Docks*.

I. *Canals*.

A canal may be defined to be an artificial highway by water constructed for the benefit of the public by adventurers authorized by the legislature to take tolls for its use, as a compensation for their risk and labour in the undertaking.

Definition of canal.

It differs from a river navigation chiefly in the fact that the company or proprietors working it do so for their own profit, and usually have the soil of the canal vested in them by the terms of their Act, whilst the trustees of a river made navigable by Act of Parliament appear usually to have a mere possession of the soil for the purposes of improving the navigation, and, like dock trustees, to be bound to apply the profits for the future benefit of the public.¹

“Canals,” said Bayley, J., in *Rex v. Nicholson*,² “are real property; they are land applied to a particular purpose, and the tolls are the profits arising from that use of the land, and are given to the proprietors as a compensation for the use of it in that manner.”

Pollock, C. B., in the case of *Manly v. St. Helens Canal Co.*,³ thus defined the status of the undertakers: “The owners of this canal are to be looked on as a trading company, who, though the legislature permits them to do various acts described in these statutes, are to be considered as persons doing them for their own private advantage, and are, therefore, personally responsible if mischief ensues from their not doing all they ought, or doing in an improper manner what they are allowed to do.”

Canal companies.

The method, therefore, hitherto pursued in treating of natural streams manifestly cannot be applied to the consideration of artificial waterways like canals. The ownership of the soil, and the rights and duties incident to canal proprietors, are in each case defined and limited by a particular private Act to which reference must be made in all cases involving the consideration

Rights of canal companies defined and limited by Act of Parliament.

Clothier v. Webster, 12 C. B., N. S. 798; *Ruck v. Williams*, 3 Hurl. & N. 308; *Whitehouse v. Fellowes*, 10 C. B., N. S. 765; *Brownlow v. Metropolitan Board of Works*, 13 C. B., N. S. 768; 16 C. B.,

N. S. 546.

¹ See *ante*, Chap. II., p. 89, and *post*, Chap. VII.

² 12 East, 330; 11 R. R. 398.

³ 2 H. & N. 840.

of any of these points. In order to ascertain the law on this subject it will be necessary to examine the construction that has been put upon this class of enactments, for the purpose of arriving at general rules with regard to it.¹

In order to consider the principles which have been followed in the construction of the private Acts incorporating canal companies, it will be well to state briefly what is the general nature of these enactments.²

They usually vest the ownership of the soil of the bed and banks of the canal in the undertakers, with certain reservations to landowners, and empower the corporate body thus formed to levy tolls for the purpose of carrying on the navigation which exists for the benefit of the general public, though they themselves are not precluded from being carriers on their own canals. The company are bound to abstain from any act which may cause inconvenience or injury either to public or private owners when carrying out their works,³ and to submit in certain cases to the due exercise of the rights of others where such rights do not interfere with their own.⁴

Such is the general tenor of these enactments, which are to be regarded as the form of contract between the public and the company. "Every canal Act," as was said by Lord Tenterden, C. J., in *Stourbridge Canal v. Wheely*,⁵ is to be considered as "a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this—that any ambiguity in the terms of the contract must operate against the adventurers, and in favour of the public; and the plaintiffs can claim nothing which is not clearly given to them by the Act. This rule is laid down in distinct terms by the Court in the case of *The Hull Dock Co. v. La Marche*,⁶ where some previous authorities are cited; and it was also

¹ There are, however, a certain number of general public statutes regulating the traffic on canals, the charges of companies, and the liabilities of the owners of barges plying on them. See for these, *post*, Chap. VII.

² See *post*, Chap. VII.

³ *Geddis v. Bann Reservoir*, 3 App. C. 430 (H. L. Ir.); *A. G. v. Bradford Navigation*, 35 L. J., Ch. 619; *Reg. v. Delamere*, 13 W. R. 757; *Preston v. Norfolk Rail. Co.*, 2 H. & N. 735.

⁴ *Monmouth Canal Co. v. Hull*, 4 H. &

N. 121; *London and Birmingham Railway v. Grand Junction Canal*, 1 Rail. Cas. 224; *Blakemore v. Glamorganshire Canal*, 2 C., M. & R. 133; *Glamorganshire Canal v. Blakemore*, 1 C. & F. 262.

⁵ 2 B. & Ad. 793; 36 R. R. 746; see *Parnaby v. Lancaster Canal*, 11 A. & E. 223; see, too, the remarks of Lord Eldon and Lord Lyndhurst in *Blakemore v. Glamorganshire Canal*, 1 M. & K. 162, 169; 1 C. & F. 262; 36 R. R. 239.

⁶ 8 B. & C. 51; 32 R. R. 337.

“acted upon in the case of *The Leeds and Liverpool Canal Co. v. Hustler*.”¹

We will now proceed to consider the various decisions on particular enactments incorporating canal companies in the following order:—

1. Such as relate to the ownership of the soil;
2. Such as turn on the rights and duties of canal companies to other proprietors;
3. Such as refer to their duties towards the public in respect of the navigation.

The soil of canals is, as a rule, vested in the proprietors absolutely by the terms of their Act, though only for the purposes for which they are incorporated.² Thus 16 *Geo. III. c. 28*, an Act for making and maintaining the Stourbridge Canal, empowers the company “to purchase land for the use of the “navigation, and vests the lands acquired by a voluntary or “compulsory sale in the proprietors for the use of the navigation, and for no other use or purpose whatsoever.”³

Ownership of the soil vested in proprietors, but only for the purposes of their Act.

They may, however, under certain circumstances, have a mere possession of land without being the owners thereof; as where the proprietor of the soil gives permission to a company to make erections, such as a dam or mound, upon it,⁴ and such possession has been held to entitle them to maintain trespass.⁴

The powers of companies vary considerably in this respect; and in each case, as was said by Lord Tenterden in *Stourbridge Canal v. Wheely*,³ “the canal having been made under the “authority of an Act of Parliament, the rights of the company “are derived entirely from that Act.” As has been stated, however, whatever the extent of the ownership may be, it is permitted solely for the purposes of the Act.

Thus a canal company, incorporated by Act of Parliament and having powers to take water for supplying their canal, cannot by user acquire an easement to take water for any other purpose,

¹ 1 B. & C. 424; 36 R. R. 746, 748; cf. Lord Brougham in *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641; *Glamorganshire Canal v. Blakemore*, 1 Cl. & F. 262.

² *Boston v. North Staffordshire Rail. Co.*, 4 E. & B. 798; *National Manure Co. v. Donald*, 4 H. & N. 8.

³ 2 B. & Ad. 793; 36 R. R. 746; as to

power of a canal company to dedicate land as a public footpath, see *Grand Junction Canal v. Petty*, 21 Q. B. D. 273; 57 L. J., Q. B. 572; 59 L. T. 767; and *R. v. Leake*, 5 B. & A. 469; 39 R. R. 521; and *ante*, pp. 87, 88.

⁴ *Dyson and another v. Collick*, 5 B. & A. 600; 24 R. R. 484; *S. C.*, 1 D. & R. 225.

and the easement to take water to fill a canal ceases when the canal ceases to exist.¹

So too, where an Act incorporating a canal company empowered them to acquire lands compulsorily, which were to vest by the Act in the company in fee simple, "for the use of "the said navigation, and to or for no other purpose or use "whatsoever," but reserved to proprietors of purchased lands the minerals and fishery over their lands, and the right to use pleasure-boats over the whole canal and reservoir; it was held that the North Staffordshire Railway Company, in whom such rights and property were vested by a subsequent Act, could not lawfully use the lake or reservoir for any other purpose than supplying the navigation with water, and an injunction was subsequently granted to restrain them from holding a regatta thereon, and also from letting out boats for hire.²

*Reg. v. Arch-
bishop of
York.*

In *Regina v. Archbishop of York*,³ B. was empowered to make a canal, to supply it from brooks, &c., and to inclose and appropriate lands proper for wharfs, quays, &c. Nothing was to authorize his using the lands for anything else than navigation. The works and things made in forming certain parts of the canal were to be B.'s property. A stream had been dammed up to feed the canal, forming a pool. This pool had been lowered and reduced in size. On part of the ground so recovered, B.'s successors had built limekilns, &c.—Held, that no right to the soil of the lands adjoining the canal, and applied to the purposes of the canal other than those works and things used in forming the canal, passed to B. where there had been no actual purchase.

*Rochdale
Canal v.
Radcliffe.*

In *The Rochdale Canal v. Radcliffe*,⁴ an Act for establishing a canal company provided that it should be lawful for owners of lands within twenty yards of the canal to draw off water for the sole purpose of condensing steam; such water to be returned to the canal, so that no damage should be done to the navigation. Defendant being tenant of a certain mill, drew off more water than was used for condensing. He set up a claim, as of right, to do so by twenty years' user. It was proved that the defendant had an old mill which had existed for twenty years, and that he had added a new mill within twenty years, communicating with

¹ *National Manure Co. v. Donald*, 4 H. & N. 8; see *Staffordshire and Worcester Canal v. Birmingham*, L. R., 11 H. L. 54; see *ante*, p. 235, *post*, p. 298.

² *Bostock v. North Staffordshire Rail.*

Co., 4 E. & B. 798. See also *Hill v. Tupper*, 9 Jur., N. S. 725; and *ante* pp. 210 *et seq.*

³ 14 Q. B. 31.

⁴ 18 Q. B. 287; 21 L. J., Q. B. 297.

the old one. The water was used for both. The existence of a cistern claimed in plea was not proved:—Held, first, the justification in respect of a certain mill was supported by proof of defendant having used the water of the old mill for twenty years. Held, also, the failure of proof as to the cistern did not entitle plaintiffs to an entire verdict.

The plaintiffs moved for judgment *non obstante veredicto*:—Held, that the company could not, consistently with their Act of Parliament, have granted water for uses not sanctioned by these Acts; that an actual grant, if proved for the purposes stated in the plea, would have been illegal, and that, therefore, a grant implied from twenty years' user was no legal defence.¹

"This is a claim," said Erle, J., "to acquire a servitude on "the canal by virtue of twenty years' user. The party seeking "to establish such a claim must show a grant by a person "capable of making the grant relied on. Now the grant here is "by a person having no distinct ownership of the water, but "entitled only to the flow of it for purposes of the navigation, "and having no right to the surplus (which was given by the "Act to the Duke of Bridgwater). If it appeared by direct "evidence that the company had made a grant to the purport "now supposed, setting out this title, that grant would have "appeared to be against the right of the public, and void on the "face of it. The twenty years' user, therefore, could establish "no right."

A verdict having been obtained for nominal damages only, in the above case, it was held that the plaintiffs would have been entitled to an injunction, having sufficiently established their right at law, had it not been for their negligence.²

Reservations of fishery, mines, roads,³ bridges,⁴ and such like rights, to the proprietors of lands on canals, are not uncommon in most of the Acts, which, it may be noted, ordinarily contain clauses empowering proprietors to sell, as well as those authorizing companies to buy, lands.⁵

Reservations of rights to proprietors of lands adjoining.

Thus, where a canal Act empowered the lord of any manor,

¹ 18 Q. B. 287; cf. *Rochdale Canal Co. v. King*, 14 Q. B. 122, 136; see *ante*, pp. 235 *et seq.*, *post*, p. 300.

² *Rochdale Canal v. King*, 2 Sim., N. S. 78; 20 L. J., Ch. 675.

³ As to roads see *Richards v. Richards*, 1 Johnson, 255; *Mold v. Wheatecroft*, 29 L. J., Ch. 11; 1 L. T. 226.

⁴ As to bridges see *Birmingham Canal Co. v. Hickman*, 56 J. P. 598; *Neath Canal Co. v. Ynisawed Colliery*, L. R., 10 Ch. 450.

⁵ See *post*, Chap. VII.; *Robins v. Warwick Canal*, 2 Bing., N. C. 483; 42 R. R. 642.

and the owner of any lands through which the canal should be made, to erect and use any wharves, quays, &c., in or upon their respective lands, and to land goods, &c., provided they did not prejudice or obstruct the navigation or towing-paths, it was held that an adjoining owner had a right to erect a wharf on his own soil, and to land goods on the towing-path, and convey them across to his wharf.¹

Fishery.

Where the right of fishery in a canal is not reserved, as it sometimes is,² it is of the kind termed territorial, being identical with the ownership of the soil, though the proprietors are of course at liberty to let it.³

An Act of Parliament incorporating a canal company provided that the lord of the manor through which the canal, reservoirs, &c. should be made, should have the right of fishery in so much of the canal, reservoirs, &c. "as shall be in the waste lands of "his manor," and that the owner of any other lands through which the canal and a collateral cut should be made, should have the right of fishing "in the said canal or collateral cut:"—Held, that "commons or waste lands" meant commonable lands, the ownership of the soil of which was in the lord, and not open fields over which certain persons had rights in severalty. Held, also, that the right of an owner of land through which the canal passed, was limited to fishing in the canal and collateral cut, excluding the reservoir.⁴

Roads and bridges.

In some cases Acts contain provisions for the benefit of mine owners with regard to the transport of minerals along canals passing through their lands.⁵ Thus in *Birmingham Canal Navigation Proprietors v. Hickman*,⁶ by 5 Will. IV. c. 84, the B. Canal Company were to make such bridges over their canals as two or more justices should "from time to time judge necessary, and appoint for the use of the owners and occupiers "of the lands adjoining" the canal. The respondent was an adjoining owner, and claimed to have a bridge made to connect his works on both sides of the canal. The justices found such bridge necessary:—Held, that the B. Canal Co. were bound to erect such bridge.

¹ *Monmouth Canal v. Hill*, 4 H. & N. 421.

² *Bostock v. North Staffordshire Rail. Co.*, 4 E. & B. 798; *Snape and Wife v. Dobbs*, 1 Bing. 202; *S. C.*, 8 Moore, 23; 25 R. R. 616.

³ Woolrych, *Law of Waters*, p. 65, *post*, Chap. VI.

⁴ *Grand Union Canal v. Ashby*, 6 H. & N. 394.

⁵ *Finch v. Birmingham Canal*, 5 B. & C. 820; see *Mold v. Wheatcroft*, 29 L. J., Ch. 11; 1 L. T. 226, as to substitution of a railway for a tram road.

⁶ 56 J. P. 598 (1892).

Reservations with regard to the right to work mines are usually made for the benefit of proprietors of purchased lands, the principle followed usually being to permit the working by the owner, at the same time making provisions in favour of the company, which empower them to inspect and purchase or make compensation for the mines where the operations carried on appear likely to endanger the canal.¹

Reservations
as to mines.
Right of
support.

In the case of *Dudley Canal v. Grazebrook*,² an Act provided that no owner of any mines should work within twelve yards of the canal without leave of the company. If the owner wished to work the mines, he was to give the canal proprietors notice, and they might inspect. If they did not inspect he might work them, and if they refused to let him work them they were to buy. By another clause nothing was to defeat the right of owners of mines to work them, provided that in working the same no injury was done to the navigation. It was held that this proviso was to be construed with some qualification—namely, either that the party working the mines was to do no unnecessary damage to the navigation, or no extraordinary damage by working out of the usual mode. Therefore, where notice had been given of the working of a coal-mine under a reservoir, and the canal company had not purchased the owner's rights, it was held that he was entitled to work the mine under the reservoir in the ordinary mode, and the reservoir having been damaged by such working, no action was maintainable for such damage; but an action would be maintainable for injury to a house erected under grant from the owner of the soil.³

*Dudley Canal
v. Grazebrook.*

In *Midland Rly. v. Checkley*,⁴ by a canal Act, the owners of mines were prohibited from getting minerals under or within ten yards from the canal without the consent of the proprietors of the canal, who, if they refused to permit the owner of any mines to work such part thereof as should be under or within ten yards from the canal, were required to compensate such owner in the manner provided by the Act: the Court held that the provisions of the Act as to the prohibition of working and compensation

*Midland Rly.
v. Checkley.*

¹ *Cromford Canal v. Cutts*, 5 Rail. Cas. 442; *Barnsley Canal v. Twibill*, 3 Rail. Cas. 451; *Dudley Canal v. Grazebrook*, 1 B. & Ad. 59; 35 R. R. 212; *Birmingham Canal v. Dudley*, 7 H. & N. 969; *Wightley Canal v. Badley*, 7 East, 366; *Birmingham Canal v. Hawkesford*, 7 East, 371; 8 R. R. 644, note; *Stourbridge Canal v. Dudley*, 3 L. J., Q. B. 108; *Swindell v.*

Birmingham Canal Co., 9 C. B., N. S. 241; 29 L. J., C. P. 364; see *ante*, Chap. III. pp. 150 *et seq.*

² 1 B. & Ad. 59; 35 R. R. 212.

³ See also *Wyrley and Exington Canal v. Bradley*, 7 East, 368; 8 R. R. 642.

⁴ L. R. 4 Eq. 19; 36 L. J., Ch. 380; 16 L. T. 620; 15 W. R. 671.

extended by implication to workings more than ten yards from the canal, and that the proprietors of the canal were not entitled, by virtue of their common law right to adjacent support, to prevent the lessee of an adjacent quarry from working more than ten yards from the canal, so as to endanger the safety of the canal, without paying him compensation in the same manner as if the quarry had been within the ten yards; but that, upon paying such compensation, they were entitled to stop the working of any mine which would be injurious to the canal.

*Consett
Waterworks
Co. v. Ritson.*

In *Consett Waterworks Co. v. Ritson*¹ an Inclosure Act provided that the lord of the manor should enjoy all mines and minerals as fully and freely as if the Act had not passed without paying damage or making satisfaction for so doing to the owners of allotments. The plaintiffs, a waterworks company incorporated under an Act of Parliament which incorporated the Lands Clauses Consolidation Act, 1845, and the Waterworks Clauses Act, 1847, purchased compulsorily from the representative of an allottee land forming part of one of such allotments, and constructed a reservoir thereon. The defendant, claiming title under the lord of the manor, gave notice to the plaintiffs of his intention to work the coal under such land within forty yards of the reservoir. The plaintiffs did not offer to purchase the minerals, and the defendant worked the coal according to the usual course and practice of mining, and thereby caused damage to the reservoir. The plaintiffs sued in respect of such damage.

The Court of Appeal (Lord Esher, M. R., Lindley and Lopes, L. JJ.), held that the Inclosure Act in question (the Lanchester Act, 1773) was so special and definite in its language that they could come to no other conclusion than that it gave to the lord of the manor and his assigns the right to work the mines so as to let down the surface of the land without paying damages or making compensation to the allottees, and they therefore reversed the judgment of the Court below;² it having been agreed, on the opening of the appeal, that in the event of the appellant succeeding upon the question of the interpretation of the Inclosure Act, questions raised under the Waterworks Clauses Act, 1847, would become immaterial.

*Knowles v.
Lancashire
and Yorkshire
Rly.*

In *Knowles v. Lancashire and Yorkshire Railway*,³ by a section of an Act empowering a company to make a canal, it was provided

¹ 22 Q. B. D. 702.

² 22 Q. B. D. 318; 60 L. T. 360.

³ 16 App. Cas. 248; 61 L. T. 91; 54 J. P. 103, H. L. E.

that nothing therein contained should affect the right of any owner of lands to the mines and minerals under the lands to be made use of for the canal, and that it should be lawful for such owners to work such mines and minerals, not thereby injuring, prejudicing, or obstructing the canal. By another section it was provided that if the owners should, in pursuing such mines, work near or under the canal so as, in the opinion of the canal company, to endanger or damage the same, or in the opinion of the owners of the mines to endanger or damage the further working thereof, it should be lawful for the canal company to treat and agree with the owners for all such minerals as might be near or under the canal as should be thought proper to be left for the security of the canal or mines; and upon payment of such satisfaction such owners should be perpetually restrained from working such mines within the limits for which satisfaction should be declared to extend. Owners of a coal mine under or near the canal having given the canal company notice that they were going to work the coal, the company declined to purchase or pay compensation for leaving the coal, and the owners then worked the coal and thereby damaged the canal. The working was in the usual mode, without negligence and without doing unnecessary damage, save in not leaving sufficient support. The House of Lords held, affirming the decision of the Court of Appeal,¹ that the owners of the mine had a right under the Act to initiate proceedings and to receive satisfaction for such minerals as should be thought proper to be left for the security of the canal or the mine, but were liable in damages for the working the mine to the injury of the canal. Lord Macnaghten says²: "The language and scheme of the Act differ from the "language and scheme of the Act which came in question in "the case of the *Dudley Canal Co. v. Grazebrook*.³ In that case "a belt was to be left unworked on each side of the canal. "They (the Canal Co.) were then to be at liberty to inspect the "mine in order to determine what minerals might be got without "damage to the canal. If they neglected to avail themselves of "this privilege the mine owner was expressly authorized to work "his mine. That express authority was, or at any rate was "considered to be, inconsistent with a provision contained in "another section of the Act, which empowered mine owners to

¹ 20 Q. B. D. 391.

³ 1 B. & Ad. 59; 35 R. R. 212.

² 16 App. Cas. at p. 257.

“work their mines provided that ‘no injury be done to the said
 “‘navigation.’ In order to reconcile the two sections it was held
 “that the party working the mines was bound ‘to do no unneces-
 “sary damage or injury to the navigation, or no extraordinary
 “‘damage or injury by working them out of the ordinary and
 “‘usual mode.’ With that limitation the Court thought that
 “all the parts of the Act were consistent with each other. In
 “the present case there are no inconsistencies to be reconciled.
 “There is no protected belt; there is no provision for notice;
 “and it is at least doubtful whether the proprietors of the
 “canal have any power of inspecting adjoining mines, except
 “in a case where the workings have been stopped by payment
 “of compensation, and it is apprehended that the mine owner
 “is working in contravention of the statutory injunction con-
 “sequent upon such payment. The scheme of the Act seems
 “to be to make the security of the canal depend upon the mine
 “owner keeping in view his statutory liability. The question is
 “not without authority. The exact point was determined by
 “Lord Cottenham in the case of *Cromford Canal Co. v. Cutts*.¹
 “In that case, under an Act identical in language with the
 “Act under consideration, a mine owner had instituted pro-
 “ceedings for the purpose of obtaining compensation for coal
 “which, in view of his statutory liability, he did not venture to
 “work. The company filed a bill to restrain these proceedings.
 “The mine owner in his answer alleged danger to the canal,
 “but did not suggest any case of danger to the mine. The point
 “taken before your Lordships was urged in that case, and
 “*Dudley Canal Co. v. Grazebrook*² was cited. But Lord Cotten-
 “ham dissolved an injunction which had been granted by the
 “Vice-Chancellor. He held that if the coal owner sustained
 “injury by getting less coal, or by working in a less beneficial
 “manner for the sake of not injuring the canal, he had a right
 “to compensation, and that he might proceed, as he proposed to
 “do, for the purpose of ascertaining whether or not there would
 “be any injury either to the owner of the coal or of the canal
 “company. The decision in the *Cromford Canal Company v.*
 “*Cutts*¹ was pronounced upon an interlocutory application; but
 “I do not agree that it is of any less authority on that account.
 “The question determined was the only question in the cause,

¹ 5 Rail. Cas. 442.

² 1 B. & Ad. 59; 35 R. R. 212.

"and it depended simply on the construction of an Act of Parliament. In such a case an order on motion has, I think, the effect and weight of a judgment at the hearing. I think that Lord Cottenham's decision was clearly right, and that this appeal must be dismissed."

In *Chamber Colliery Co. v. Rochdale Canal Co.*¹ the House of Lords have held, affirming the Court of Appeal, that under an Act similar to that in the last case, the owner of mines adjacent to but not under a canal does not come within a provision in the Act, for the purchase of minerals "near and under the canal" to be left for the security of the canal; consequently that if the working of such mines near the canal would not endanger or damage the further working of the mines, although it would cause some damage to the canal, the owner could not insist against the will of the company upon minerals being left for the security and preservation of the canal, and upon receiving satisfaction from the company therefor, the company being willing that the owner should work as he pleased, and preferring from time to time to bear the expense of the necessary repairs to the canal rather than compensate the owner for his unworked minerals.

Chamber Colliery Co. v. Rochdale Canal Co.

In *New Moss Colliery Co. v. Manchester, Sheffield and Lincolnshire Railway*,² under an Act identical in effect with the statutory provisions construed by the House of Lords in *Knowles & Sons v. Lancashire and Yorkshire Railway Co.*,³ and *Chamber Colliery v. Rochdale Canal Co.*,⁴ plaintiffs were the owners of coal mines under the canal and the lands on both sides of it, and, being advised that if they continued their workings within certain limits on both sides of the canal they would damage it, they gave the defendants (who had succeeded to the rights and obligations of the canal company) notice of their intention to work the subjacent and adjacent coal, and requiring them to treat for the coal necessary to be left for the security of the canal. The defendants replied that no coal need be left and declined to treat. Plaintiffs then sued defendants for—(a) a declaration that they were entitled to work all their adjacent coal, although the result might endanger or damage the canal,⁵ or in the alternative (b) a declaration that plaintiffs were entitled

New Moss Colliery Co. v. M., S. and L. Rly.

¹ (1895) A. C. 564; 64 L. J., Q. B. 645; 73 L. T. 258.

² (1897) 1 Ch. 725; 66 L. J., Ch. 381; 76 L. T. 231; 45 W. R. 493.

³ 14 App. Cas. 248.

⁴ (1895) App. Cas. 564.

⁵ See also *Wyrley and Essington Canal Co. v. Brudley*, 7 East, 368; 8 R. R. 642.

to be paid, under sect. 38, satisfaction for adjacent coal left as protection. The Court held that the plaintiffs were entitled to declaration (a), but that on the plaintiffs and defendants making admissions that the cost, if any, of repairing damages to be sustained to the canal and works by getting all the coal would be trifling compared with the value of the coal required to be left for the absolute protection of the canal and works, and that such damage could be repaired from time to time, and would not interfere with the navigation, and on the defendants undertaking not to claim damages in the future in respect of the plaintiffs working the subjacent coal, and at their own expense to repair any damage thereby caused, the plaintiffs were not entitled to any declaration respecting the subjacent coal.

*L. & N. W.
Rly. v. Evans.*

In *L. & N. W. Rly. v. Evans*,¹ by a private Act of Geo. II. the undertakers were authorized to make an existing brook navigable, and to maintain and use such navigation, and to make such new cuts and canals as might be necessary for the purpose, the undertakers first giving satisfaction to the owners of lands which should be made use of, or prejudiced, which satisfaction might be by a yearly payment or by a sum in gross. The Act contained no reference to minerals. The brook was made into a canal, compensation being made to the landlords by annual payments. The navigation subsequently became vested in the plaintiffs. The defendants, who were owners of coal under the canal, worked it so as to cause a subsidence, and the plaintiffs brought their action for an injunction on the ground that they had a right to support:—Held, by Kekewich, J., that the grant of a right to make and maintain the navigation without any grant of the land, did not carry with it the right of support so as to prevent the landowners from working their mines. The Court of Appeal held that where an express statutory right is given to make and maintain something requiring support, *the statute, in the absence of a controlling context, must be taken to mean that the right of support shall accompany the right to make and maintain*—that if the Act does not provide any means of obtaining compensation for the loss occasioned to the landowner by his having to leave support, this is a strong argument against the legislature having intended to

¹ (1893) 1 Ch. 16; 62 L. J., Ch. 1; 2 R. 120; 67 L. T. 630; 41 W. R. 149, C. A.

give such right; but that if it contains provisions under which compensation can be obtained, it needs a strong context to show that the right to support is not given—that under the Act in the present case compensation could have been successfully claimed for the damage occasioned to the landowners by making their mines unworkable—that the legislature, therefore, must be taken to have intended to give a right of support, and that the plaintiffs were entitled to an injunction. A. L. Smith, L. J., says¹:—

“It is a correct proposition of law that when an Act of Parliament empowers undertakers to make and maintain works for the benefit of the public upon the land of others, and such works of necessity require the support of the subjacent soil, and the Act provides for compensating the landowners for damages, both to the surface and subjacent minerals, by reason of the execution of the contemplated works, then, unless there be something in the Act to the contrary, a necessary implication arises that the Act gives to the undertakers a right to subjacent support for the works authorized to be constructed and maintained. In stating this proposition I do not wish to be understood as holding that nothing less than the above will suffice to raise the implication of the right to subjacent support, but this case does not, in my opinion, necessitate an inquiry as to what, if anything less, will suffice. In my judgment, if the conditions above stated are to be found in an Act of Parliament, a necessary implication does arise that the undertakers are entitled to subjacent support for their works as against the mineral owner below. This proposition appears to be one which is irresistible, for it is impossible to suppose in the premises mentioned that the legislature contemplated that the mineral owner might let down and destroy the works authorized to be constructed for the benefit of the public.”

It is usual in canal Acts to insert clauses providing for the amount of compensation² to be given by companies for damage done to the interests of neighbouring proprietors.

Thus a canal Act provided that no mine owner should work within forty yards of certain tunnels without leave of the

Liabilities of canal companies as to compensation under their Acts.

¹ (1893) 1 Ch., p. 31.

² In order to induce the Court to issue a mandamus to a canal company to make compensation to a claimant a clear refusal on the part of the company must

be shown; mere delay in attending to the claim is not sufficient: *Reg. v. Wilts and Berks Canal*, 8 D. P. C. 623; 4 Jur. 848 (see *Reg. v. Thames and Isis Navigation*, 8 A. & E. 201).

company; and if the company, instead of insisting on full forty yards, should require less than thirty yards, a quantity not exceeding thirty yards was to be left for the security of the mine. Whenever a mine should become workable within forty yards, the mine owner should give notice, and the company should pay him for so much of the forty yards as they required to be left:—Held, that where a mine had become workable within forty yards of the tunnels, and the company had required the whole forty yards to be left, the owner of the mine was entitled to compensation for the forty yards.¹

*Halliday v.
Mayor of
Wakefield.*

In *Halliday v. Mayor of Wakefield*,² a special Act, incorporating the Waterworks Clauses Act, 1847, empowered the making of a reservoir in lands containing coal mines. The waterworks undertaker having given the mine owners notice to treat for part of the coal, the mine owners claimed compensation (to be settled by arbitration), not only for the value of the land to be taken (as to which no question arose), but also for injurious affection and prospective damage. The arbitrator found that the workings of the mine owners had not as yet approached the reservoir so as to cause any present risk to the mines from the existence of the reservoir; that if the mine owners were free to work their mines without risk of interruption from the undertakers' works, they could and would have got the whole of certain seams of coal under the reservoir and within forty yards of the boundary, and that if the undertakers purchased and retained *in situ* the coal which they had given notice to take and no other coal, the mine owners, by reason of the undertakers' works and of apprehension of injury therefrom to one seam, could not get more than 50 per cent. of the coal under the reservoir or within twenty yards of its boundary; that a prudent lessee working without right to compensation would be compelled by reason of such apprehension of injury to abstain from working more than 50 per cent. of the coal within the defined area; and that there was no reason to apprehend injury, present or future, from the undertakers' works to any part of the mines if 50 per cent. of the coal in the defined area were retained *in situ*.

The House of Lords held, affirming the decision of the Court of Appeal,³ that the mine owners were not entitled to claim or

¹ *Fenton v. Trent and Mersey Navigation Co.*, 2 Rail. Cas. 837; cf. *Cromford Canal v. Cutts*, 5 Rail. Cas. 442; *Dunn v. Birmingham Canal Co.*, L. R., 8 Q. B.

2; *Reg. v. Delamere*, 13 W. R. 757.

² (1891) App. Cas. 81.

³ 20 Q. B. D. 699.

recover compensation for the prospective prevention of the working of more than 50 per cent. of the coal within the defined area: inasmuch as though the word "lands" in sect. 6 of the Water-works Clauses Act, 1847, includes "mines," the mine owners were not "injuriously affected" within the meaning of sect. 6; neither could they at present claim or recover under the mines clauses of that Act, sects. 18 to 27.

Where under a canal Act commissioners were appointed for settling all matters in dispute between the company and the owners of lands prejudiced, and the amount of compensation was to be assessed by a jury, and to be binding and conclusive to all intents and purposes; it was held that the verdict and judgment were conclusive as to the amount, but not as to the claimants' right to compensation.¹

It was provided by an Act for making a canal, that in case of disputes a jury should assess the value of the land, and award recompense either for damages which should or might before that time have been sustained, or for the future, temporary, or perpetual continuance of any recurring damages. It was also enacted that all the works should be completed within fifteen years. A jury having assessed the value of land at 6*l.*, the present damage at *nil*, but the future damage at 2,800*l.*; it was held that this verdict was wrong, since, in order to enable the jury to assess future damages, the cause of the injury must already exist in some of the work done; and it was also held, that unless the undertakers had finally abandoned the work, they might take the land on payment of 6*l.* at any time during the fifteen years.²

In the somewhat similar case of *Thicknesse v. Lancaster Canal Co.*,³ where no specified time was assigned within which the canal should be completed, it was held that a Court of law could not interfere, since no limitation as to time could be assigned to the powers conferred by an intendment that they were to be exercised within a reasonable time.

It has been held that the owner of tithes from land taken for the purposes of a navigation, being land covered with water, was not entitled to compensation as the owner of a hereditament under an Act giving compensation to all persons seised, possessed, or interested of or in any lands, tenements or hereditaments which should be taken thereunder.⁴

¹ *Barker v. Nottingham Canal Co.*,
15 C. B., N. S. 726.

² *Lee v. Milner*, 2 M. & W. 824.

³ 4 M. & W. 472.

⁴ *Rees v. Commissioners of the Nene Outfall*, 9 B. & C. 875.

So, too, a person entitled to an easement over certain lands has been held not qualified to maintain trespass for acts done on such land, though he might have claimed compensation under a canal Act as soon as actual damage was sustained.¹

In *Kennett and Avon Navigation v. Witherington*,² the plaintiffs were authorized by an Act to maintain a navigation, and alter dams, &c., from time to time. Persons injured were to receive compensation from commissioners under the Act. The commissioners were named, and power was given them to appoint successors. They all died without doing so. The company afterwards raised a certain dam to the injury of the defendant, a mill-owner below:—Held that, although the mill-owner should have no longer any means of obtaining compensation—as to which point the Court gave no opinion—the power to alter the dam still existed.

Liability
at common
law for
negligence.

In addition, however, to the duty imposed on them by statute to make compensation, companies will be held liable at common law for damage done by them through negligence or mismanagement of their works.³

Where a canal Act contained provisions for compensation, it was held that such provisions related to the due and proper management of the works, and not to their negligent management, and, therefore, did not oust the right of action against a canal company for so negligently keeping their sluices open that their canal overflowed.⁴ This case appears to be in conflict with a decision of Kekewich, J., where it was held that a canal company were guilty of negligence in allowing water to leak from a canal into a mill, but that where compensation is given under special provisions of an Act it must be recovered as directed by the Act, and not by action,⁵ and an injunction was refused. The learned judge also held that the fact of the damage having been caused by the wrongdoing of a mine owner did not affect the case.

So too, where a canal company so negligently managed a swivel bridge as to cause the death of a person passing over it, they were held liable to an action for nuisance as having a beneficial interest in the tolls, as any private person would be, and the representative

¹ *Thicknesse v. Lancaster Canal Co.*, 4 M. & W. 472.

² 18 Q. B. 530.

³ *Preston v. Norfolk Railway*, 2 H. & N. 735.

⁴ *Cockburn v. Erewash Canal*, 11 W. R. 34; see *Rochdale Canal v. King*,

14 Q. B. 102; *Shand v. Henderson*, 2 Dow, H. L. C. 519; 14 R. R. 202; and *post*, p. 297.

⁵ *Erans v. Manchester, Sheffield, and Lincolnshire Railway*, 36 Ch. D. 626; 57 L. J., Ch. 153; 57 L. T. 194.

of the deceased was held entitled to maintain an action against them under 9 & 10 *Vict. c. 93*.¹

In the last-named case, it was contended for the company that they were no more liable than the trustees of a highway would be. Martin, B., however, said: "With respect to the first point, viz., that there is no distinction between this company and the trustees of a highway, it seems to me there is a most obvious one. It appears that in the 28th year of the reign of King George II. a certain number of persons were authorized to make this canal; and I find, by the recital of 11 *Geo. IV. c. 1*, that these works were made. The property in them was divided into 480 shares. Now, I have no doubt, that the shares in this canal constitute a most valuable property, and that there is no analogy whatever between the condition of this company and that of persons who exclusively and entirely act for a public trust. These are persons to whom the legislature gave the privilege of forming and completing a most valuable private property, and are as much responsible for any injury from works connected with it, as any other owner of private property would be."²

Where, however, companies keep strictly within the terms of their Acts, they will not be held liable, either for compensation or at common law, for injuries caused in the due execution of their works. All actions for injury caused thereby must be founded on negligence.

In the absence
of negligence.

So where a canal company discharged water from their canal into a stream, and so injured certain works situated thereon, the jury having found that the canal company did all in their power under the circumstances, a verdict was directed for them, on the ground that there was no negligence.³

A canal formed under Act of Parliament had three levels, A., B. and C., and the proprietors, without authority, erected engines and pumped back water from the lowest level C. to the others. The plaintiff was possessed of a mill forge on the river Tame, into which the surplus water from C. level would flow. In 1826,

¹ *Manley v. St. Helens Canal*, 2 H. & N. 840; see also *Shoebottom v. Egerton*, 18 L. T. 364, 889; *Gantret v. Egerton*, 36 L. J., C. P. 191; L. R., 2 C. P. 371; 16 L. T. 17; *Binks v. South Yorks Rly.*, 3 Bingh. 244; *Lang v. Kerr*, 3 App. Cas. 529; see also *A.-G. v. Bradford Navigation Co.*, 35 L. J., Ch. 619; L. R., 2

Eq. 71; 14 L. T. 248.

² See *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; 2 H. & N. 849; *Parnaby v. Lancaster Canal*, 11 A. & E. 227; and see *post*, pp. 303 *et seq.*

³ *Whitehouse v. Birmingham Canal*, 27 L. J., Ex. 25; *Mayor of King's Lynn v. Pemberton*, 1 Sw. 244, 250; 18 R. R. 62.

the canal proprietors obtained, by means of a new Act, the right to maintain the engines, and to raise the water from one level to another, and to have reservoirs supplied from streams, making full satisfaction to all mill-owners, &c., for any damage. They were forbidden to take any water out of the river above the plaintiff's forge, and were to maintain flood weirs, so that all *waste water* not required should flow into the river above plaintiff's forge. The company pumped water from C., and in consequence thereof, except on extraordinary occasions, no water escaped over the weirs into the river:—Held, they were entitled to do so, and the plaintiff had no right to compensation; the water, which could be used again, and was pumped back again, not being waste water.¹

Where a swing bridge over a canal crossing a public highway, when open for the passage of a barge left a gap, whereby a passer by, being on the bridge when it was dark, fell into the canal and was drowned, it was held that there being no negligence on the part of the company, and the deceased having been guilty of contributory negligence, no action would lie.² And in the same way, a canal company was held not liable for the death of a person drowned by falling into their canal where an ancient footway was twenty-four feet distant from their towing-path, and the intermediate space between the two had become obliterated by the act of unauthorized persons; since the owner of land near a public road is not under an obligation to fence excavations in his land, unless they are substantially adjoining the road, and so near as to be dangerous.³

Where the company have done all in their power.

No action of tort will, however, lie against a canal company for damage done to a mine near their canal by flooding it, when they have done all in their power to prevent such flooding.

In the case of *Dunn v. Birmingham Canal Co.*,⁴ the defendants were authorized under their Act to take land, doing as little harm as possible, and making satisfaction for all damage to any hereditaments prejudiced. The minerals under the canal were reserved to the owners, who were at liberty to work them provided no damage was done to the navigation. The owners were not to work the minerals without giving three months' notice

¹ *Ellucell v. Birmingham Canal*, 3 H. L. 812.

² *Witherly v. Regent's Canal*, 12 C. B., N. S. 2.

³ *Binks v. South York Railway*, 3

Bing. 244. See *Lang v. Kerr*, 3 App. Cas. 529.

⁴ L. R., 8 Q. B. 42; see *Erans v. Manchester, L. and S. Rail. Co.*, 36 Ch. D. 626; 57 L. J., Ch. 153; 57 L. T. 194.

to the defendants, who might inspect the mines and prevent the working of them, paying the owners the value. The canal having been used many years, the plaintiff gave defendants notice that he was going to work certain mines, but the defendants did not inspect, and refused to buy. Plaintiff worked his mines without negligence, but without regard to supporting the surface, and defendants did all they could to keep the canal watertight. The result of the working was that the water of the canal escaped through the cracks and flooded the plaintiff's mine, whereupon he brought his action. It was held that no action of tort would lie, though Kelly, C. B., and Pigott, B., were of opinion that the plaintiff was entitled to compensation under the Act. "Striking out the charge of negligence," said Kelly, C. B., "the defendants are charged with nothing but that they brought water into the canal near the plaintiff's mine. They had full power under the Act to bring the water where they brought it."

If, moreover, the damage be caused by circumstances over which the company had no control, and can be proved to result from *vis major*, canal companies will not be held liable. *Vis major,*
how far an
excuse.

A canal company placed planks across their canal, when it was threatened with an overflow from a neighbouring river, in order to keep out the flood-water from their premises. The insertion of the planks raised the water, and the flood broke into the canal higher up than the planks, and, being penned back by the planks, flooded the plaintiff's premises. It was held that the canal company (the defendants) were not liable, since the water which did the mischief was not brought there by them.¹ "The flood," said Bramwell, B., "is a common enemy against which every man has a right to defend himself, and it would be most mischievous if the law were otherwise, for a man must then stand by and see his property destroyed out of fear lest his neighbour might say—'You have caused me an injury.' The law allows what I may term a reasonable selfishness in such matters; it says, 'Let every one look out for himself and protect his own interest.'"²

Amphlett, B., said, "The plaintiffs cannot succeed unless it can be shown that the canal, through what was done by the defendants, did bring a larger amount of water on to

¹ As to this question, see further *ante*, Chap. III., pp. 147—154.

² *Nield v. London and North Western Rail. Co.*, L. R., 10 Ex. 4; 44 L. J., Ex. 15.

“the plaintiff’s premises than would have gone there if the canal had never been made, or had been previously filled up.”¹

A similar principle was followed in *Boughton v. Midland and Great Western Rail. Co.*,² where the defendants, who were authorized by statute to make a canal, and required to keep it in good order, preparatory to making some repairs, turned the water into a drain (made for the purpose), whence it ought to have flowed (as it did on a previous occasion) into a public sewer, but, owing to an obstruction therein, flooded the plaintiff’s premises. The defendants heard of the flooding, but not of the cause, and took no steps to stop the discharge into the drain. It was held, that while acting under their statutory powers, they could not, in the absence of negligence, be made responsible for the injury, and, the jury having found that the damage was caused by the obstruction in the corporation sewer, that there was no evidence of such negligence on the part of the defendants. So in *Thomas v. Birmingham Canal Co.*,³ upon the occasion of an universal rainfall unprecedented in duration and quantity for many years in the district, there was imminent peril of the defendants’ canal bursting; and the defendants, in order to prevent it, raised a sluice, by which a large quantity of water escaped into a neighbouring brook, and thence into a colliery. The water having filled up this colliery flowed into some collieries of the plaintiffs and destroyed their works. It was found that if relief had not been afforded to the canal banks at this time, an inundation must have very shortly ensued, which would have equally destroyed the plaintiffs’ works and also caused far greater devastation to property and probably loss of life throughout a very wide area; that the course adopted by the defendants was prudent and proper, and the only effectual measure which was possible in the emergency. It was held, that the plaintiffs’ injury was due not to the defendants’ wrongful acts, nor to the effect of any of the provisions of the defendants’ Act of Parliament, but to *vis major* or an act of God, and that, as in any event the plaintiff’s works would have been equally destroyed, the immediate damage caused by the defendants’ own act in raising the sluice was *injuria absque damno* and irrecoverable. Such acts of self-defence must, however, be done to avoid a common danger,

¹ *Nield v. London and North Western Rail. Co.*, L. R., 10 Ex. 4; 44 L. J., Ex. 15.

² Ir. R., 7 C. L. 109.

³ 43 L. T. 435; 49 L. J., Q. B. 851; 45 J. P. 21.

and no one can transfer such a danger coming on to his land to the land of another.¹

The terms of conveyances of land to companies are regulated in each case by the provisions of each particular Act, but the ordinary rules with respect to such contracts would appear to be binding on them.²

Ordinary rules of construction as to conveyances binding on canal companies.

A local Act empowered proprietors to contract for the sale of, and to sell their lands to, a canal company; and such contracts, sales, &c., were to be valid to all intents and purposes, and were to be enrolled with the clerks of the peace. Copies thereof were to be evidence; and on payment of the sums agreed on, the lands were to vest in the company. It was held that conveyances of land under the Act must be in writing.³

A canal company, empowered to purchase lands for gross sums, or rent-charges, took possession of lands of an infant on agreement with his steward, and, after an award by commissioners of the gross sum or rent-charge, such sum was paid to the steward. No person being party to this award who had power to bind the infant, it was invalid, and no conveyance was executed, and the purchase-money was returned. The company, however, used the land for the canal, paying rent for forty years to the landowner after he attained his majority. It was held that no agreement for sale of the fee, in consideration of the rent-charge, could be presumed to have been entered into or ratified by the landlord, but that an action of ejectment, as well as the intended erection of a bridge by the latter, should be restrained by injunction, on the ground of acquiescence, the company undertaking to put in force their parliamentary powers for the purchase of land.⁴

In another case, lands were demised in 1779 by P. to M. and Company for sixty-five years. In 1794 an Act was obtained for making Swansea Canal through part of the lands in question; and it was enacted that on payment or tender of certain sums for the purchase of such lands, and, by leave of the owners, such lands should vest in the canal company. In 1797 the Duke of

¹ *Whalley v. Yorks. and Lancs. Rail. Co.*, 13 Q. B. D. 131; 50 L. T. 472; *ante*, p. 158.

² As to enrolling conveyances of purchased lands, see *Reg. v. Leeds and Liverpool Canal Co.*, 11 A. & E. 316; as to limit of time for purchasing compulsorily, *Tone Conservators v. Ash*, 10 B. & C. 349;

as to license to take ice from a canal, see *Newby v. Harrison*, 4 L. T. 424.

³ *Robins v. Warwick Canal*, 2 Bing. N. C. 483; 42 R. R. 642; see *Harborough v. Shadlow*, 7 M. & W. 37.

⁴ *Somerset Canal v. Harcourt*, 2 De G. & J. 546.

Beaufort made arrangement with the company to extend the canal through certain other of the lands. No payment or satisfaction was made, but the owners, &c. consented. On the termination of the lease of 1779, the assignees of the reversion brought ejectment against the assignee of the Duke of Beaufort, who remained in possession of the canals:—Held, the mere consent of the owner of the land to the construction of the canal did not bring the case within the Act, and the lessors of the plaintiff were entitled to the land. Per Parke, B., “The “reversioner could not create such an interest except by “deed.”¹

A question as to copyhold lands arose in the case of *Dimes v. Grand Junction Canal*.² There an Act of Parliament gave the defendants powers to purchase lands, and also provided a form of conveyance. S. was tenant of copyhold land, and sold part to the company, the then lord not objecting. On the death of S., the lord made proclamation for the heir of S. to come and be admitted. No one appeared, and the lord seized the land “*quousque*,” and brought ejectment against the defendants, and obtained judgment on the ground that the conveyance, under the canal Act, only vested in the defendants an equitable estate. He interfered to stop the navigation, and the defendants, having filed a bill praying that the customary heir of S. might be admitted on their paying all fees, and having sought a perpetual injunction, the Vice-Chancellor made a decree directing the customary heir of S. to be admitted to hold as trustee for the canal company, and granted an injunction. On appeal, the House of Lords affirmed this decision.

The Court will not grant a mandamus to compel a canal company to proceed to assess the value of land taken by them, if the parties interested in the land do not apply within a reasonable time, especially where there is another remedy by ejectment.³

Where a canal company had powers under their Act to take and give leases of other canals, and sold their rights under another Act to the Oxford Railway Company, it was held that the latter had authority to take a lease of another canal.⁴

Where a particular jurisdiction is appointed under a canal

Remedies for
injuries by
canal com-
panies.

¹ *Patrick v. Beaufort*, 6 Ex. 498; 20 L. J., Ex. 251.

² 3 H. L. 794.

³ *Rex v. Stainforth*, 1 M. & S. 32; 14

R. R. 389; cf. *Shand v. Henderson*, 2 Dow, 519; 14 R. R. 202.

⁴ *Rogers v. Oxford Rail. Co.*, 25 Beav. 322.

Act to determine all questions as to things to be done under the Act, if the canal proprietors do anything not exactly in accordance with the terms of the Act, and not strictly within the powers thereby given, the person aggrieved is not restricted to the particular jurisdiction, but the complaint is to be entertained by the ordinary jurisdiction, on the principle that anything done not in exact conformity with the Act is not done in pursuance of it.¹

Parties injured, however, are bound to use due diligence in applying for redress.

So where a canal company had deviated from the line prescribed by the Act, and had not adhered to the previous steps required thereby, in occupying the appellants' grounds, Lord Eldon, though he held that the company were trespassers, and liable to damage, said, "Where a person stands by while an act not strictly legal is done, having the means to prevent it, the remedy by injunction is gone."¹

A question as to the right to the use of the surplus water of a canal under special Acts of Parliament arose in the case of *Blakemore v. The Glamorganshire Canal*.² The Acts of Parliament³ authorizing the formation of the canal contained a reservation, in favour of the owners of certain iron works, of the surplus water flowing from the canal, down a certain cut or watercourse. The canal works were to be completed within two years. Some years after the passing of these Acts, the plaintiff purchased the iron works aforementioned, and brought a series of actions against the defendants for making certain alterations in, and widening and deepening the canal for the purpose of increasing the traffic, whereby the flow of water to his works was diminished.

Rights to surplus water.
Blakemore v. Glamorganshire Canal.

At the first trial of this case the jury found that there had been a wilful waste of water in the management of the canal, with damages for the plaintiff, upon which judgment was entered up in the Court of Exchequer.⁴ Judgment afterwards came by writ of error before the Court of Exchequer Chamber, and ultimately before the House of Lords, and on both occasions was affirmed.

At the second trial⁵ it was held, that the company, having after the two years erected an engine to force up more water into

¹ *Shand v. Henderson*, 2 Dow, H. L. Jerv. 60.

C. 519; 14 R. R. 202.

² 1 M. & K. 154; 36 R. R. 289; 1 C.

& F. 262; 2 C. M. & R. 133; 3 Y. &

³ 30 Geo. III. c. 82; 36 Geo. III. c. 69.

⁴ 3 Y. & Jerv. 60.

⁵ 2 C. M. & R. 133.

the canal, whereby they were enabled to pass more barges down it, the plaintiffs were entitled to consequential damages on account of the surplus water having been diminished.

On the hearing before the House of Lords,¹ Lord Lyndhurst, *inter alia*, held, that the making of the canal fixed the rights of the parties, and the canal owners had no right afterwards to enlarge the canal, and draw much larger quantities of water, so as to injuriously affect the plaintiff's works; and that the clauses in the second Act (36 Geo. III. c. 69) directing that the canal should be completed in two years, and that the money to be raised should not be applied to the expense of any other work not made within the time, not only limited the application of the money to the works completed within the time, but that no works should be carried on adversely to the interests of individuals after the two years.

The plaintiff, Mr. Blakemore, subsequently obtained a series of injunctions to restrain the works of the company, in all of which he succeeded, the Court holding the canal company to be bound by the terms of their Acts.²

"If my opinion upon the effects of the Acts of Parliament be 'right,'" said Lord Eldon,³ "then, although the owners of these 'works must take the surplus water, subject to the diminution 'which an increase of trade upon the present canal shall occasion, let it increase ever so much, or ever so little, I can never 'agree to the proposition as laid down in some parts of the 'answer, that the proprietors of the navigation are at liberty to 'improve the canal for the purpose of bringing upon it an 'increase of trade, and by such improvements, with a view to a 'contemplated increase of traffic, to affect the surplus water, 'which was, I apprehend, to be preserved for the benefit of the 'plaintiff's works.'"

*Staffordshire
and Worces-
tershire Canal
v. Birming-
ham Canal.*

The case of *The Staffordshire and Worcestershire Canal v. Birmingham Canal*⁴ raised a somewhat similar point, and turned on the right to the use of the surplus water of one canal by the other.

The S. and W. Canal was formed under an Act of Parliament. Two years later another Act passed, authorizing the formation of the B. Canal, and requiring the latter company to make a "communication" between the B. and the S. and W. Canals at

¹ 1 C. & F. 262.

² 1 M. & K. 162; 36 R. R. 289.

³ 1 M. & K. 168; 36 R. R. 289.

⁴ L. R., 1 H. L. 254; 35 L. J., Ch. 757.

A., giving the latter company power to make this communication if the B. Company should not make it within a given time. The communication was made by the S. and W. Company under an agreement between the two companies, and some years afterwards improved by B. Company, who saved much water by substituting two locks for one at one particular spot, the original communication being effected by means of twenty locks.

A consolidating Act was passed¹ which contained in the 15th section provisions enabling the B. Company, the proprietors of several canals, to raise the water of the canals from one level to another by reservoirs and machinery, &c. The 88rd section, with a view to preserve the communication at A., forbade the B. Company to use water from or out of the W. level (which was the highest level of the B. Company—the communication at A. being 182 feet below it) for any purpose whatever when the depth of the water in the lowest lock of the B. communication should stand at less than three feet perpendicular, to be reckoned from the sill of an upper gate in the S. and W. Canal adjoining thereto, and in case of breach of this prohibition, and consequent injury to the S. and W. Company, directed that any damages sustained should be assessed by a jury. The 258th section prohibited the B. Company from doing anything to obstruct the navigation of the S. and W. Canal, or “in any wise to shorten or vary all or “any of the company’s canals, so as thereby to impede the navigation of the S. and W. canal” without the consent of the S. and W. Company. By the interpretation clause the word “canals” was to include “communications.” The B. Company proposed to construct machinery which should pump back some of the water coming from the W. level, and so would affect the supply to the S. and W. Canal, but would not prevent the existence and free use of the communication at A. The S. and W. Company filed a bill to prevent the construction of this machinery, alleging that it was contrary to the intention of the legislature, as shown in the various Acts, and to the deed of arrangement, and also contrary to the right which must now be taken as vested in the S. and W. Company by user and prescription.

The appellants relied on *Tapling v. Jones*,² and *Elwell v. Birmingham Canal*;³ for the respondents, *Rochdale Canal v.*

¹ 5 Will. IV. c. 34.

² 3 H. L. Cas. 812.

³ 11 H. L. Cas. 290.

Radcliffe,¹ *Magor v. Chadwick*,² and *Arkwright v. Gell*,³ were, *inter alia*, cited.

It was held, affirming the decision of the lords justices, that the bill must be dismissed, and that the powers granted by the Acts were granted for specific purposes, which were those of making and maintaining a free communication between different places by navigable canals; and that the ordinary doctrines as to the permissive use of water did not apply in such a case, and that no grant could be made by the B. Company of the use of any water which might injuriously affect these purposes. That consequently no right by prescription could in this case have any foundation in grant. Nor could any prescriptive right by user be founded on the fact that the B. Company had for many years allowed the water to pass out of the B. canal in a particular manner, so as to prevent the B. Company from afterwards improving its machinery and economizing the water, for the water so passing into the S. and W. Canal, did not constitute a stream or watercourse within the meaning of the Prescription Act, 2 & 3 Will. IV. c. 71. The object of the communication being fully secured, the proposed works, it was held, were not an impeding or obstructing of the S. and W. Canal, such as was prohibited by the Act.

"The 2nd section of that Act" (2 & 3 Will. IV. c. 71), said Lord Chelmsford, L. C., "applies to a claim to the use of water "which may be lawfully made at common law by custom, prescription or grant. Custom and prescription are here out of "the question, and if the respondent could not have granted the "use of the water to the appellants, the Act is wholly inapplicable; but to impose such a servitude upon the water in their "canal, as that contended for by the appellants, would have "been *ultra vires* of the respondents, and consequently length "of user could never confer an indefeasible claim upon the "appellants under the Prescription Act, as no grant of the use of "the water could have been lawfully made by the respondents."

Lord Cranworth observed, "The water flowing from the "Wolverhampton level to the Atherley junction is not a natural "nor even an artificial stream. The water in the canal is not "flowing water. It is accumulated under the authority of the "legislature in what is in fact a tank or reservoir, which the

¹ 18 Q. B. 287; 21 L. J., Q. B. 297.

³ 5 M. & W. 203; 8 L. J., Ex. 201.

² 11 Ad. & E. 571; 9 L. J., Q. B. 159.

"respondents are bound to economize and use in particular manner for the convenience of the public. It never flows. It is let down artificially for the convenience of persons wishing to pass in boats. To such water none of the doctrines, either as to natural or artificial streams, is applicable; and the only way in which appellants could have obtained a right to insist, on having a lock full of water discharged into their canal, must be by express grant or covenant by respondents. Of such grant there is no trace whatever, and it cannot be presumed. To have entered into any such engagement would have been a clear breach of duty in respondents."¹

In the *Manchester Ship Canal Co. v. Rochdale Canal Co.*² it was held by the House of Lords, affirming the Court of Appeal and Byrne, J., that the defendant company being a canal company and not a waterworks company, the true meaning of "waste water" in the statutes was "water not legitimately needed for navigation or other purposes authorized by such statutes," and that the defendants had no right to sell such waste water to the injury of the plaintiffs, the owners of the Bridgewater Canal.

In the case of *Mason v. Shrewsbury Rail. Co.*,³ a canal company, under the powers of their Act, diverted before 1800 a great part of the waters of a brook flowing through the plaintiff's land to their canal, the rest of the water continuing to flow as before. In 1847 the defendants, under Act of Parliament, bought and discontinued the canal, and in 1864 restored by means of a cut the water which had been diverted. In 1865 they sold the part of the canal on which was the cut. The bed of the brook, owing to the diminished scour from 1800 to 1853, had become silted up, so as not to be sufficient to carry off the water in extraordinary floods. In 1866, such a flood having damaged the plaintiff's land, it was held by the Court, that there being no obligation imposed on the canal to continue the diversion of the water, plaintiff had no right of action. The opinion of Blackburn and Hannen, JJ., proceeded on the ground that, though the claim to have the water diverted was a claim to a watercourse under the Prescription Act, 2 & 3 Will. IV. c. 71, yet the enjoyment was not of right, and, therefore, though of

Claim against
a canal com-
pany to have
water
diverted.

¹ See *ante*, p. 235.

² 81 L. T. 472, C. A. 1899, affirmed by H. L., 1900; 85 L. T. 585.

³ L. R., 6 Q. B. 578; 40 L. J., Q. B.

293; 25 L. T. 239; cf. *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Hodgson v. Mayor of York*, 28 L. T., N. S. 836.

more than forty years, it conferred no right on the plaintiff. That of Cockburn, C. J., was based on the ground that the plaintiff, the owner of the servient tenement, could acquire by the mere existence of the easement, no right against the owner of the *dominant* tenement. "The question appears to me to "depend on principles of the law relating to easements, which "would have been equally applicable if the Act in question "(Prescription Act) had never been passed."¹

Canal companies entitled to ordinary remedies at law.

Where the statutory rights of companies are infringed, they are entitled to the ordinary remedies at law.²

"Such a company," said Erle, J., in *Rochdale Canal Co. v. King*,³ "has all the rights and remedies which an individual "owner of property has, unless the statute contains some "provision to take them away."

In that case the plaintiffs were empowered to purchase lands for making a canal, and manufacturers within a certain distance were authorized to lay pipes and to use water for the sole purpose of condensing steam; disputes with any person desirous of taking or using the same were to be referred to commissioners.

The declaration stated that the company had made the canal and that the defendants had used the water for purposes other than that of condensing steam. It was objected in arrest of judgment that the declaration did not show any ownership of the canal or water, or any invasion of a private right, inasmuch as the act complained of, if wrongful, was clearly prohibited by statute, so that the repetition of the act could never be used as evidence of a right; that the remedy was by indictment, and that the complaint should have been referred to the commissioners who had exclusive jurisdiction.

It was held, however, that the declaration was good, as it must be held that the company was in possession of the canal, and that without special damage the wrongful act was a damage to the company's right; and also that the jurisdiction of the commissioners was over disputes between persons in the use of or about to use the water for a rightful purpose, and not over wrongdoers.⁴ Erle, J., observed, "It is said the company

¹ See *ante*, Chap. IV., pp. 255 *et seq.*

² *Rochdale Canal v. King*, 14 Q. B. 122, 136; 15 Jur. 896.

³ *Ibid.*; cf. *Rochdale Canal v. Radcliffe*, 18 Q. B. 287; see *ante*, p. 278.

⁴ See *Cockburn v. Erewash Canal*, 11 W. R. 34, and *ante*, p. 287; *Shand v. Henderson*, 2 Dow, H. L. C. 519; 14 R. R. 202, *ante*, p. 297.

“could have no property in this water; perhaps not in the identical passing atoms, but they had in the flow, the *flumen aque*.”

In bringing actions, canal companies, like individuals, are liable to be deprived of their remedy by laches.

Where a canal company made a demand in May, 1842, for penalties for obstructing their canal, such obstruction having been caused in November, 1840, and June, 1841, and brought no action till July, 1842, it was held that they were too late, since by the Act of the railway companies who had caused the obstruction, no action was to be brought against them for injury done in pursuance of the Act after six months, which six months were held to begin to run from the ceasing of the obstruction, and not from the demand for non-payment of the penalty.¹

The owners of a canal taking tolls for the navigation are bound, at common law, to use reasonable care in making the navigation secure.²

Duties with regard to navigation.

*Parnaby v. Lancaster Canal*² was an action which came before the Exchequer Chamber on error from the Court of Queen's Bench. The declaration in the case stated that by 32 *Geo. III.* c. 101, the Lancaster Canal Company was formed to make and maintain the canal, with power to take tolls, and that all persons had free liberty to navigate the canal; but if any boat should be sunk in the canal, and the owner or person having care of it should not, without loss of time, weigh it up, the Act empowered the company to weigh it up and detain it till payment of expenses. That the company completed the canal, and took tolls on it; that a boat sunk in the canal, so that vessels passed with difficulty in the day, and at night were in danger of running foul of it; that, although the company could and ought to have requested the owner to weigh it up, and, if that was not done without loss of time, could and ought to have weighed it up, and, in the meantime, have caused a light or signal to be placed

Duty to maintain navigation.

¹ *Kennet and Aron Canal v. Great Western Rail. Co.*, 4 Rail. Cas. 90; cf. *Rochdale Canal v. King*, 2 Sim., N. S. 78; *Lord Oakley v. Kensington Canal Co.*, 5 B. & Ad. 138; *Fraser v. Swansea Canal*, 1 Ad. & El. 354; *S. C.*, 3 N. & M. 391; see Lord Brougham in *Blake-more v. Glamorganshire Canal*, 1 M. & K. 161; 36 R. R. 289; *Shand v. Henderson*, 2 Dow, H. L. C. 519; 14 R. R. 202.

² *Parnaby v. Lancaster Canal*, 11 A.

& E. 223; see *Mersey v. Gibb*, L. R., 1 H. L. 93; 35 L. J., Ex. 225; 14 L. T. 677; *Winch v. Conservators of Thames*, L. R., 9 C. P. 738; L. R., 7 C. P. 456; *Forbes v. Lee Conservancy*, 4 Ex. Div. 116; *Lane v. Newdigat*, 10 Ves. 192; 7 R. R. 381; and *post*, Chap. VII.; as to liability of canal commissioners for not giving notice to lessees to repair, see *Priestley v. Foulds*, 2 Scott, N. R. 265; 2 Man. & G. 1731.

to enable boats to avoid it; yet the company did not cause the owner, &c. to weigh it up, nor themselves weigh it up, nor place a light or signal, whereby the plaintiff's boat, navigating the canal, ran foul of the sunken boat and was damaged.

On the trial, before Coleridge, J., at the Liverpool Summer Assizes, 1836, it was objected that, admitting the facts as laid in the declaration, no breach of duty was shown. Verdict being given in favour of the plaintiffs, leave was reserved to move for a nonsuit, but judgment was entered up for the plaintiffs.

The defendants brought error in the Exchequer Chamber, when the judgment of the Court of Queen's Bench was affirmed.

Tindal, C. J., says at p. 242 of the report:¹ "The facts stated in the inducement show that the company made the canal for their profit, and opened it to the public upon the payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not, perhaps, to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property. We concur with the Court of Queen's Bench in thinking that a duty of this nature is imposed upon the company, and that they are responsible for the breach of it, upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap-door open without any protection, by which his customers suffer injury."²

Right to
recover for
damage to
navigation.

It follows from the principle above noticed, that canal proprietors will not be enabled to recover damages for injuries to their navigation unless they keep it in good order. A canal company, who were bound to repair the banks of their navigation, brought an action against an adjacent landowner for digging clay pits on his land, and so causing the plaintiffs' banks to give way. There was some evidence that the banks were not in good repair; but the learned judge directed the jury to find for the plaintiffs if they thought the falling in of banks was caused by the digging the clay pits:—Held, that the plaintiffs were not entitled to recover unless the banks were in good repair.³

¹ 11 A. & E., p. 242.

² Cf. *Harris v. Baker*, 4 M. & S. 27; 16 R. R. 370. See further as to Navigation and the duties of persons navigating,

post, Chap. VII.

³ *Staffordshire Canal v. Hallen*, 6 B. & C. 317; 30 R. R. 333.

In *Walker v. Goe*,¹ commissioners of a navigation were authorized to lease the canal, and, in case the lessees should permit the canal to be out of repair, the commissioners were authorized and required to give them notice, and to specify the repairs which ought to be done. In case the lessees neglected to do the repairs, the commissioners might seize the tolls. The canal having been leased, the lessees allowed the canal to get out of repair; but the commissioners gave no notice to them, and a barge going through a lock was damaged by the lock falling in. It was held that the barge owner, assuming a duty on the part of the commissioners to give notice, had no right of action against them, as the damage to the barge was not a damage naturally flowing from their neglect; it being pointed out by Wightman, J., that the primary duty to repair was on the lessee.

In *Llewellyn v. Swansea Canal*,² where the company had by their Act the usual powers for maintaining the navigation, the question as to what constitutes acts necessary for maintaining navigation, was raised. The defendants had agreed to pay the plaintiffs 10*l.* a week for any water above a certain lock, when they should consider it necessary for maintaining the navigation of the canal below that lock. It was held—when, boats having twice sunk in going through the lock, the plaintiffs each time emptied it, in order to get them up, and then filled from above the lock—that this was not using the water for the purposes of *maintaining the navigation* below the lock, and, therefore, that the 10*l.* a week could not be recovered. But when, on another occasion, they did the same for the purpose of repairing the lock below, it was held that the 10*l.* was recoverable, since the latter object did constitute such a purpose.

What are works necessary for maintaining navigation.

Where a canal company were authorized to make a canal, and do other acts necessary for the making, improving, and using it, it was held that they were empowered to deepen and widen it after it had been completed, and to charge for so doing.³

A company were authorized by a navigation Act to maintain a navigation, and to alter dams, &c., from time to time; and it was provided that persons injured were to receive compensation from commissioners under the Act. The commissioners were named; and power was given to them to appoint successors, but they all died without doing so. The company afterwards raised a certain

¹ 4 H. & N. 350.

² 2 H. & N. 509.

³ *Rez v. Glamorganshire*, 7 B. & C. 722.

Bridges.

dam, to the injury of a mill-owner below, who pulled it down. It was held that the power to alter the dam still existed, although the mill-owner should have no longer any means of obtaining compensation, on which point the Court gave no opinion.¹

Canal companies are usually empowered by the incorporating Act to construct and maintain bridges—a provision which is rendered necessary to remedy inconveniences arising from their powers to interrupt highways.

Thus, in *Rex v. Lindsay*,² a canal company having such powers, who had made a cut and deepened a ford crossing a highway, and had thereby rendered a bridge necessary, were held bound to maintain it, and unable to throw the burthen of the repair on the inhabitants of Lindsay, county Lincoln.

Bridges thus constructed must be adequate to meet the wants of the public.

This point was thoroughly discussed in the case of *Manley v. St. Helens*,³ already referred to.

There the defendants were authorized by an Act of Parliament to make a canal, and to take tolls and make bridges, and to turn and alter highways as necessary. By a subsequent Act, 11 *Geo. IV. c. 1*, to consolidate and amend the former, it was recited that the navigation cut or canal, and other the works authorized to be made by the recited Act, have been long since made and completed. By sect. 48, the Company were empowered to maintain the canal, bridges, &c.; and by sect. 124, all persons were to have free liberty with boats to navigate the said canal for the purpose of conveying goods, &c. The company made a cut through a public highway near to St. Helens, then a small village, and made a swivel bridge over it. Penalties were imposed on persons leaving open bridges. A boatman having left a swivel bridge open, a person coming along fell in and was drowned. It was proved that when the bridge was open, there was no fence between the road and the water, and that two lamps, which used to be there, were removed.

The jury having found that the deceased was drowned by neglect of the company, it was held that they were liable to an action for nuisance, as having a beneficial interest in the tolls,

¹ *Kennet and Aron Navigation v. Witherington*, 18 Q. B. 530.

² 14 East, 317; 12 B. R. 529. See as to "BRIDGES," *post*, Chap. VIII.

³ 2 H. & N. 840. See also *Shoebottom v. Egerton*, 18 L. T. 364; *Gautret v. Egerton*, L. R., 2 C. P. 371; 36 L. J., C. P. 191; 16 L. T. 17; and *ante*, p. 291.

as any private person would be; that the representative of the deceased was entitled to bring an action against them under 9 & 10 *Vict. c.* 98, and that the bridge being in their possession the action was rightly brought against them and not against the boatman. It was further decided that whether or not the bridge was sufficient when built, the company were bound to maintain it sufficient with reference to present circumstances.

What amounts to a dedication of a bridge erected by a company to the public can only be decided by the evidence in each particular case.¹

The navigation of canals² is, of course, open to all the public on the payment of tolls, and it has been held that there is a public right of user of a canal with boats propelled by steam, provided they do no more injury than is occasioned by traction by horses.³

Navigation
open to public
on paying
tolls.

It has been held that a provision in a local Act (9 *Geo. III. c.* 71), empowering a company to make bye-laws for the government of a navigation, bargemen, &c., and to impose tolls, did not authorize them to make a bye-law closing the navigation on every Sunday in the year, and declaring that no business should be done thereon, nor should any person navigate any boat, &c., on penalty of 5*l.*⁴

The subject of tolls will be found treated at length in a subsequent chapter,⁵ and therefore it will be only necessary here briefly to allude to it.

Tolls.

Where a canal is made by Act of Parliament, the right to take tolls being derived solely from the Act, is to be considered as a bargain between the owners and the public; and where there is any ambiguity, it must be construed against the canal proprietors, who can claim nothing which is not given them by the Act.⁶

Such was the principle laid down in the case of *Stourbridge Canal v. Wheeley*.⁷ There a canal was formed upon two levels, which were connected by a chain of locks (there being no lock

¹ See *Grand Surrey Canal Co. v. Hall*, 1 M. & G. 392, and cases *post*, Chap. VIII.

² See further as to "NAVIGATION," *post*, Chap. VII.

³ *Cuse v. M. Rail. Co.*, 5 Jur., N. S. 1007. The case was ordered to stand over for experiments to be made by an engineer appointed by the Court to ascertain the damage to the canal by

the use of steam.

⁴ *Calder and Hebble Navigation v. Pilling*, 3 Rail. Cas. 735.

⁵ See *post*, Chap. IX.

⁶ *Leeds and Liverpool Canal v. Hustler*, 1 B. & C. 424; 36 R. R. 746, 748; *Stourbridge Canal v. Wheeley*, 2 B. & A. 793; 36 R. R. 746.

⁷ 2 B. & A. 793; 36 R. R. 746.

whatever on the upper level), and where the Act of Parliament making the canal authorized all persons to navigate thereupon with boats, upon payment of such rates and dues as should be demanded by the Company, not exceeding the rates therein mentioned; and also by another clause, authorized the Company to take certain rates and duties for every ton of iron and other goods navigated on any part of the canal, and which should pass through any one or more of the locks, but gave the owners of adjoining lands power to use pleasure-boats on the canal without paying dues, so as the same did not pass through any lock, and were not used for carrying goods: it was held, that the Act gave the Company no right to demand tolls for boats navigating the upper level of the canal, in which there were no locks.¹

In *Britain v. Cromford Canal*,² where, by a canal Act, a toll of 1s. per ton was imposed upon all coal, &c., navigated upon any part of the canal from a place A., or from any place within two miles thereof: it was held, that this only applied to voyages commencing within those limits, and that no such toll was payable for coal loaded at a place more than two miles from A., although conveyed upon a part of the canal within two miles of A.

The regulation of traffic and tolls is now provided for by various general statutes.³

It has been held that the mortgagee of the tolls of a canal, held by him in trust to pay creditors and discharge incumbrances, is a proprietor of a river navigation, so as to be liable to the payment of the salary to the clerk.⁴

We will conclude this section with a few remarks as to canal shares,⁵ though a full consideration of this branch of law does not properly come within the scope of this work.

Canal shares.

Canal shares are not estate and interest in land within the

¹ *Stourbridge Canal v. Wheeley*, 2 B. & Ad. 792; 36 R. R. 746.

² 3 B. & Ald. 139.

³ 8 & 9 Vict. c. 28; 8 & 9 Vict. c. 42; 10 & 11 Vict. c. 94; 17 & 18 Vict. c. 31; 36 & 37 Vict. c. 48; 37 & 38 Vict. c. 40; 51 & 52 Vict. c. 25 (the Railway and Canal Traffic Act, 1888); see *Strick v. Swansea Canal*, 16 C. B., N. S. 245; *In re Orlade and N. E. Ry. Co.*, 15 C. B., N. S. 680; *In re Jones v. E. Counties Ry. Co.*, 3 C. B., N. S. 718; *In re Nicholson v. S. W. Ry.*, 5 C. B., N. S. 366. Cf. also *Staffordshire and Worcestershire Canal v. Trent and Mersey Navigation*,

6 Taunt. 151; *Re v. Leicestershire and Northamptonshire Canal*, 3 Rail. Cas. 1; also *Keppel v. Bailey*, 2 Myl. & K. 517; 39 R. R. 264; Woolrych, pp. 308, 309; see also *post*, Chap. VII.

⁴ *Tibbits v. Yorke*, 5 B. & Ad. 605.

⁵ As to calls for canal shares, see *Huddersfield Canal v. Buckley*, 7 T. R. 36; *Weald of Kent Canal v. Robinson*, 5 Taunt. 801; *Norwich and Lowestoft Navigation v. Theobald*, Moo. & Malk. 151; *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341; see Woolrych, pp. 50 *et seq.*

meaning of the Statute of Mortmain; and it does not matter if the Act of Parliament incorporating the company does not contain a clause declaring the shares to be personal property.¹

Where an Act of Parliament declared that canal shares "should be deemed personal estate, and transmissible as such," they were held to be personal property, though the profits arose out of land, and to pass as such upon the bankruptcy of the holder.²

Where by Act of Parliament canal shares were to be deemed to be personal estate, it was held that they did not bear the character of realty so as to make a bequest of them specific.³

By a canal Act the shares were to be deemed personal property. The canal ran through the dioceses of Worcester and Lichfield. The transfer of shares and payment of dividends was in Lichfield:—Held, that for purposes of probate, the shares, being personal property, might be considered locally situate in Lichfield.⁴

The Court will grant a mandamus to a canal company to enter on their books the probate of the will of a shareholder, leaving any question as to validity of probate to be raised by return to the writ.⁵

The law relative to canal tolls, and the rateability of canals and canal tolls, is fully discussed in a future chapter.⁶

II. Water Supply.

Water is supplied⁷ to the public (1) By companies having parliamentary powers; (2) By companies which have no such parliamentary authority; or (3) By local authorities.⁸

Water supply under three kinds of bodies.

(1) *In the case of companies having parliamentary powers*, a special Act is obtained, with which it is customary to incorporate the following general enactments:—*The Waterworks Clauses Acts*, 1847 and 1863; *The Lands Clauses Consolidation Acts*, 1845,

Companies with parliamentary powers.

¹ *Edwards v. Hull*, 6 De G., M. & S. 74. The shares in the navigation of the Avon under statute 10 Anne are real estate and liable to dower: *Buckeridge v. Ingram*, 2 Ves. J. 652; 53 R. R. 220. See *House v. Chapman*, 4 Ves. 542; 4 R. R. 292.

² *Ex parte Lancashire Canal Co.*, 1 Dea. & Ch. 411.

³ *Robinson v. Addison*, 2 Beav. 515; 50 R. R. 264.

⁴ *Ex parte Horne*, 7 B. & C. 632.

⁵ *Re v. Worcester Canal*, 1 M. & R.

529.

⁶ See *post*, Chap. IX.

⁷ The law relating to water supply is manifestly too wide a subject to be treated exhaustively in a work like the present. The reader is referred for details to the excellent work of Messrs. Michael & Will on the Law relating to Gas and Water Supply (2nd edition, 1877), to which the authors are indebted for most of the materials for this section.

⁸ Michael & Will, p. lvi.

1860 and 1869; and *The Companies Clauses Consolidation Acts*, 1845, 1863 and 1869.¹

The Water-
works Clauses
Act, 1847.

The preamble of *The Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17),² states that it is expedient to comprise in one Act sundry provisions usually contained in Acts of Parliament authorizing the construction of waterworks for supplying towns with water, and that as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings as for ensuring greater uniformity in the provisions themselves.

The Act extends "only to such waterworks as shall be "authorized by any Act of Parliament hereafter to be passed," "which shall declare that this Act shall be incorporated therewith; and all the clauses of this Act, save so far as they shall "be expressly varied or excepted by any such Act, shall apply "to the undertaking authorized thereby, so far as the same shall "be applicable to such undertaking, and shall, with the clauses "of every other Act which shall be incorporated therewith, form "part of such Act, and be construed therewith as forming one "Act." (Sect. 1.) The term "*special Act*" is defined (sect. 2) to mean "any Act which shall be hereafter passed authorizing "the construction of waterworks, &c. and with which this Act "shall be incorporated." By the same section the word "prescribed," used in this Act in reference to any matter herein stated, shall be construed to refer to such matter as the same shall be prescribed or provided for in the special Act, and the sentence in which such word occurs shall be construed as if instead of the word "*prescribed*" the expression "prescribed "for that purpose in the special Act" had been used: and the expression "*the lands and streams*"⁴ shall mean the lands and streams of water which shall, by the special Act, be authorized to be taken or used for the purposes thereof; and the expression

¹ Michael & Will, p. lvi.

² An Act for consolidating in one Act certain provisions usually contained in Acts authorizing the making of waterworks for supplying towns with water. Sect. 12 does not empower a company to execute any works not authorized by the special Act: *Simpson v. South Staffordshire Waterworks Co.*, 11 Jur., N.S. 453; 34 L. J., Ch. 380.

³ The Court will not restrain a company from applying to Parliament for a new Act, at the instance of a shareholder, as a right of making such an

application is incident to a joint stock company of that description: *Ware v. Grand Junct. Water Co.*, 2 Russ. & M. 470; 34 R. R. 136.

⁴ By sect. 3, "*lands*" include "messuages, lands, tenements and hereditaments, or heritages of any tenure;" "*streams*" include "springs, brooks, rivers, and other running waters." The Act places the taking of streams on the same footing as the taking of land under 8 & 9 Vict. c. 18; see *Ferrand v. Bradford (Mayor of)*, 21 Beav. 412; 2 Jur., N. S. 175.

"the undertaking" shall mean "the waterworks and the works connected therewith by the special Act authorized to construct the water works."¹ "Water rate" is defined by sect. 3 to include "any rent, reward or payment to be made to the undertakers for a supply of water."

This statute was amended by the 26 & 27 Vict. c. 98, *The Waterworks Clauses Act*, 1863,² sect. 1 of which, after reciting the Act of 1847, states that "sundry provisions of the like nature, but not comprised in the said Act, are now frequently introduced into Acts of Parliament relating to waterworks, and it is expedient to comprise such last-mentioned provisions also in one Act;" and sect. 2 of which provides that the terms used in the Act shall have the same meaning as the same terms when used in *The Waterworks Clauses Act*, 1847, and the provisions as to the recovery of penalties contained therein are incorporated with this Act.³

Waterworks Clauses Act, 1863.

The Lands Clauses Consolidation Act, 1845⁴ (8 Vict. c. 18), consolidates the provisions usually introduced into Acts relative to the purchase of land for public purposes. By sect. 1, it applies "to every undertaking authorized by any Act which shall hereafter be passed, and which shall authorize the purchase or taking of lands for such undertaking." It enacts that "this Act shall be incorporated with such Act; and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the

The Lands Clauses Consolidation Act, 1845.

¹ Sect. 3 defines "waterworks" to mean "the waterworks and works connected therewith, by the special Act authorized to be constructed."

² An Act for consolidating in one Act certain provisions frequently inserted in Acts relating to Waterworks.

³ By sect. 1, "The two Acts may be cited together as the Waterworks Clauses Acts, 1847 and 1863." For decisions on points connected with these Acts, cf. *Atkinson v. Gateshead Waterworks Co.*, 2 Ex. Div. 441; 46 L. J., Ex. 775; 36 L. T. 761; *Bush v. Troubridge Waterworks Co.*, L. R., 10 Ch. 459; 44 L. J., Ch. 45; 33 L. T. 137; *Metro-politan Board of Works v. New River Co.*, 37 L. T., N. S. 124; *Edgemore Highway Board v. Colne Valley Water Co.*, 46 L. J., Ch. 889; *New River Co. v. Mather*, L. R., 10 C. P. 442; 44 L. J.,

M. C. 105; 32 L. T. 658; see *post*, note (4), p. 314, and note (1), p. 319. See, too, *Hildreth v. Adumson*, 8 W. R. 470.

⁴ An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of lands for undertakings of a public nature. The preamble states the expediency of comprising in one general Act sundry provisions usually introduced into Acts of Parliament relative to the acquisition of lands required for works of a public nature, and to the compensation to be made for the same, "and that as well for the purpose of avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for insuring greater uniformity in the provisions themselves." (Sect. 1.)

"clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act, and be construed therewith as forming one Act." Section 2 defines "*special Act*" to mean "any Act which shall be hereafter passed which shall authorize the taking of lands for the undertaking to which the same relates, and with which this Act shall be so incorporated as aforesaid;" and section 5 provides the form in which portions of the Act may be incorporated with other Acts.¹

The Acts amending this enactment, and cited with it, are *The Lands Clauses Consolidation Acts of 1860 and 1869* (23 & 24 Vict. c. 106, and 32 and 33 Vict. c. 18).

The Companies Clauses Consolidation Acts of 1845, 1863, and 1869 (8 Vict. c. 16,² 26 & 27 Vict. c. 118,³ 32 & 33 Vict. c. 48)⁴ consolidate the law regulating the constitution of companies incorporated for carrying on undertakings of a public nature.

Of the powers of companies incorporating these statutes, the authors of "The Law relating to Gas and Water" write:—"Thus authorized, a company may take compulsorily lands⁵ and "streams,"⁶ subject to the provisions and restrictions of the Lands

The Lands Clauses Consolidation Acts, 1860 and 1869.

The Companies Clauses Consolidation Acts.

Rights of water companies.

¹ "*Prescribed*" is defined as in the Waterworks Clauses Act, 1847, sect. 2. The same section defines "*the works*" or "*the undertakings*" to mean the works or undertakings of whatever nature which shall by the special Act be authorized to be executed, and "*the promoters of the undertaking*" to include the parties, whether company, undertakers, commissioners, trustees, corporations, or private persons, by the special Act empowered to execute such works or undertaking. "Land" includes "messuages, lands, tenements, and hereditaments of any tenure." (Sect. 3.) By sect. 6, power is given to promoters of undertakings to purchase lands by agreement, and sect. 7 enables parties under a disability to sell and convey. For decisions on points connected with these Acts, cf. *Stone v. Corporation of Yeovil*, 2 C. P. D. 99; *Bush v. Trowbridge Water Co.*, L. R., 10 Ch. 459; *North Eastern Rail. Co. v. Elliot*, 6 Jur., N. S. 817; *New River Co. v. Midland Rail. Co.*, 36 L. T., N. S. 529; see note (4), p. 314, and note (1), p. 319.

² An Act for consolidating in one Act certain provisions usually inserted in Acts with respect to the constitution of companies incorporated for carrying on undertakings of a public nature.

³ An Act for consolidating in one Act certain provisions frequently inserted in

Acts relating to the construction and management of companies incorporated for carrying on undertakings of a public nature.

⁴ An Act to amend the Companies Clauses Act, 1863.

⁵ "Lands" include "mines": *Halliday v. Mayor of Wakefield*, (1891) App. Cas. 81. As to meaning of "other minerals," see *Glasgow (Mayor of) v. Furie*, 13 App. Cas. 657; 58 L. J., P. C. 33; 60 L. T. 274.

⁶ A water company, who were authorized in 1869 by their Act to make a reservoir with a dam across a stream, and to impound all the waters of that stream and of other streams then flowing into that stream above the dam, have the right to stop any person from diverting the water of that stream or its tributaries above the dam, but not to stop any person using water above who had a right to do so at the time their Act was passed.

A person who makes an artificial cutting and so brings water to a stream which did not go there before, can *primâ facie* cut it off if he chooses. *Brymbo Water Co. v. Lester's Lime Co.*, 8 R. 329 (1894).

There is no penalty for taking water from an unoccupied house under the Waterworks Acts: *Piercy v. Pope*, 45 L. T. 477; 30 W. R. 60. As to covenants for supply of water between two companies, see *Hartlepool Gas and Water*

“Clauses Act in exercising such powers. The undertakers must “make to the owners and occupiers of and all other parties “interested in any lands or streams taken or used for the “purposes of the special Act, or injuriously affected by the “construction or maintenance of the works thereby authorized, “or otherwise by the execution of the powers thereby conferred, “full compensation for the value of the lands and streams so “taken or used, and for all damage sustained by such owners, “occupiers and other persons by reason of the exercise, as to “such lands and streams, of the power vested in the undertakers.”¹ The amount of the compensation² is to be determined, and the payment enforced in the manner provided by the Lands Clauses Consolidation Acts. For the purpose of constructing waterworks, the undertakers may enter upon the lands and places described on the plans³ and in the books of reference, and may take the levels and set out parts thereof, and dig and break up the soil,⁴ and trench and sough the same, and remove and use earth, stone, mines, minerals, trees, and other things. They may sink wells,⁵ make, maintain, alter, or discontinue reservoirs, waterworks, cisterns, tanks, aqueducts, drains, cuts, sluices, pipes, culverts, engines, and other works⁶ and erect buildings;

Co. v. West Hartlepool Harbour Rly. Co., 12 L. T. 366.

¹ Michael & Will, pp. lviii. *et seq.* The introduction contains a summary of the powers and duties of water companies. See also *Consett Water Co. v. Ritson*, 22 Q. B. D. 702. Mine owners are not entitled under sect. 6 to compensation for the prospective prevention of the working of part of their coal by the formation of a reservoir under a special Act, inasmuch as though the word “lands” includes “mines” the mine owners were not “injuriously affected” within the meaning of the section: *Halliday v. Mayor of Wakefield*, (1891) App. Cas. 81. See also *Stone v. Corporation of Yeovil*, 2 C. P. D. 99, *post*, p. 319, n. (1).

² As to meaning of “price” and “compensation” under a special Act, see *Stockton and Middlesboro' Water Board v. Kirkleatham Local Board*, (1893) A. C. 464; 62 L. J., Q. B. 356; 69 L. T. 661; see also *Blantyre v. Batbie*, 13 App. Cas. 631 (H. L. Sc.).

³ Errors, misstatements, and wrong descriptions of any lands, streams, or the owners, lessors, or occupiers thereof, on the plans or books of reference may be corrected before the justices subject

to the conditions prescribed by the Act. As to meaning of “plan” see *East Molesey Local Board v. Lambeth Waterworks*, (1892) 3 Ch. 289; 62 L. J., Ch. 82; 67 L. T. 493. The deposit of plans of their underground works, pursuant to sects. 19 and 20 of the Waterworks Clauses Act, 1847, is a condition precedent to the right of a company incorporated under that Act to recover for injuries caused to their pipes by the ordinary and usual workings of a sub-jacent mine: *South Staffordshire Waterworks Co. v. Mason*, 56 L. J., Q. B. 255; 57 L. T. 116; see *In re Corporation of Dudley*, 51 L. J., Q. B. 121; L. R., 8 Q. B. D. 86.

⁴ As to cutting through girders of a railway bridge, see *Glasgow Corporation v. Glasgow and S. W. Rly. Co.*, (1895) A. C. 376; 64 L. J., P. C. 171; 72 L. T. 809; *Thompson v. Sunderland Gas Co.*, 2 Ex. D. 429.

⁵ See as to this point, *South Shields Waterworks Co. v. Cookson*, 15 L. J., Ex. 315.

⁶ These words include surface works, such as valve covers: *East London Water Co. v. St. Matthew, Bethnal Green*, 17 Q. B. D. 475; 55 L. J., Q. B. 571; 54 L. T. 919.

they may also divert and impound water from the streams mentioned for that purpose in the special Act or the plans or books of reference, and alter the course of such streams not being navigable, and take such waters as may be found in and under or on the lands to be taken for constructing the works. In the exercise of these powers, the undertakers are to do "as little damage as can be;"¹ and in all cases where it can be done, they "are to provide other watering places, drains, and channels for the use of adjoining lands in place of any such as shall be taken away or interrupted by them, and are to make full compensation to all parties interested for all damage sustained by them through the exercise of such powers."² Provision is made for the settlement by justices of differences as to the construction of accommodation works, for cases where the undertakers take land containing minerals or interfere by the works with the working of mines, and for the mode in which streets are to be broken up³ for the purposes of laying pipes.⁴

¹ As to negligence in leaving a stopcock box uncovered, see *Smith v. Southwark and Vauxhall Co.*, 53 J. P. 424; *Chapman v. Eyde Waterworks Co.*, (1894) 2 Q. B. 599; 64 L. J., Q. B. 15; 71 L. T. 539; *Moore v. Lambeth Water Co.*, 17 Q. B. D. 462; *Kemp v. Worthing Local Board*, 10 Q. B. D. 118. As to liability for escape of water, see *ante*, pp. 150 *et seq.*

² *Michael & Will*, pp. lviii. *et seq.* Unless otherwise authorized by their special Act, the undertakers must not deviate from the line of the works laid down in the plan more than ten yards when constructing their waterworks, nor may they lay down any pipe or other work in any land not dedicated to public use without the consent of the owners and occupiers thereof.

³ As to sects. 48 and 52 of 10 & 11 Vict. c. 17, on this point, see *Glorer v. East London Waterworks*, 16 W. R. 310; 17 L. T., N. S. 475, C. P.; and as to minerals, see *Huddersfield Corporation and Jacomb, In re*, 17 L. R., Eq. 476; 30 L. T., N. S. 78; 31 L. T., N. S. 466. As to breaking up a private road, see *Hill v. Wallasey Local Board*, (1894) 1 Ch. 133, *post*, p. 324, n. (3).

⁴ *Michael & Will*, pp. lviii. *et seq.* For the rights and duties generally of bodies exercising statutory powers, see *ante*, pp. 268 *et seq.*; it will be useful here, however, to note some of the leading decisions relating to the rights and liabilities of water companies who, while prevented by the law from unduly

trenching on the rights of the public, are at the same time protected from harassing actions by individuals which otherwise interfere with the discharge of their functions. The mere fact that the breach of a statutory duty has caused damage, does not vest a right of action in the person suffering against the person guilty of the breach. This is regulated by the wording and object of each statute.

In *Atkinson v. Gateshead Water Co.*, 2 Ex. Div. 441; 46 L. J., Ex. 775; 36 L. T. 761, the plaintiff brought an action for damages against the company for not keeping their pipes charged as required by their Act, whereby his premises were burnt down. Under the Waterworks Clauses Act, 1847, the company were bound—(1) to maintain fire plugs, sects. 33—43; (2) to furnish a sufficient supply of water for certain public purposes, sect. 37; (3) to keep pipes to which fire plugs are affixed at a certain pressure at all times, and to allow all persons to use it for extinguishing fire at all times, without payment, sect. 42; (4) to supply all owners with sufficient water for domestic purposes, sect. 35. A penalty of 10*l.*, of which one-half may be awarded to the informer, is imposed for each breach, and for breaches of duties (2) and (4) they are to forfeit 40*l.* a day, sects. 37 and 43:—Held (reversing the decision of the Court of Exchequer), that the statute gave no right of action. Per Cockburn, C. J., "If any person is injured

On the other hand, as respects the rights of the public, Rights of the public.
 "Owners and occupiers are entitled to demand a supply of pure

"by a breach of such duty, he must
 "have recourse to the statutory remedy,
 "and cannot maintain an action for
 "damages." See, too, *New River Co. v. Johnson*, 6 Jur., N. S. 374; *Blagrove v. Bristol Waterworks Co.*, 1 H. & N. 369; 26 L. J., Ex. Ch. 57; *Barber v. Nottingham and Grantham Rail. and Canal Co.*, 15 C. B., N. S. 726; 33 L. J., C. P. 193.

A water company had laid mains along a turnpike road under an Act which declared the soil to be in the owners on each side. On an action being brought by a firm who had contracted with K., owner of the soil on both sides, to make a cut through the embankment on which the road and pipes were carried over his soil for the stoppage of their works by an escape of water from the company's pipes; it was held that, assuming K., the owner, could have maintained an action against the defendants (as to which the Court gave no opinion), the plaintiffs could not. "If we did so (*i.e.* held defendant liable), we should establish an authority for saying that in such a case as *Fletcher v. Rylands*, the defendant would be liable, not only to an action "by the owner of the drowned mine, "and by such of his workmen as had "their tools destroyed, but to an action "by every workman employed in the "mine, who in consequence of its stoppage made less wages." *Blackburn, J.*; *Cuttle v. Stockton Water Co.*, L. R., 10 Q. B. 453; 44 L. J., Q. B. 139; 33 L. T. 475.

An Act, incorporating the Waterworks Clauses Act, 1847, empowered the Trowbridge Water Company to divert the water of certain springs forming the principal supply of a brook. The owner of a water meadow below through which the brook subsequently flowed, alleged by bill that the water was materially diminished, and prayed that defendants might be restrained and compelled to treat for the purchase of her interest under the 18th clause of the Lands Clauses Act. It was held, that not being an owner of anything "taken" under the Act, she could not compel defendants to treat for purchase, and her proper remedy was to apply for compensation for lands injuriously affected. *James, L. J.*, said, "I am of opinion that it is impossible in any "legal or other sense of the words to "say that she was the owner or occupier "of anything which they entered on or "took. They entered on the channel or "bed of a stream somewhere above

"plaintiff's land, and there they took,
 "by way of diversion, water for purposes
 "of their waterworks, which water, to
 "put the case in the highest for the
 "plaintiff, would in due course, if they
 "had not so diverted it, have gone down
 "to her land, and would then and so
 "long as it was over her land, be water
 "of which she was the owner and
 "occupier in the sense in which a person
 "is the owner or occupier of a stream
 "running through his land, that is to
 "say, the water would have then become
 "within the ownership, and to some
 "extent, within the occupancy of the
 "plaintiff. But when it was intercepted
 "by defendants just as if it had been
 "intercepted by any other riparian
 "proprietor, although it might have
 "become part of her property the water
 "which was actually intercepted was
 "not her property." *Bush v. Trowbridge Water Co.*, L. R., 10 Ch. 459; 44 L. J., Ch. 45; 33 L. T. 137. See, too, *Simpson v. South Staffordshire Waterworks Co.*, 11 Jur., N. S. 453; 34 L. J., Ch. 380; 13 W. R. 729; *A. G. v. Bristol Waterworks*, 10 Ex. 884; 24 L. J., Ex. 205.

In *Waller v. Mayor of Manchester*, 6 H. & N. 667, the defendants were empowered to construct a reservoir, but were not to divert the waters of the river Etherow till it was completed. They were to discharge seventy-five cubic feet of water per second for twelve hours a day under 50*l.* penalty, and they were not to divert any water from the river Etherow till they had commenced to discharge seventy-five feet per second. Defendants made a reservoir which, through engineering difficulties, was never completed, but they diverted the waters of the river Etherow in 1857, and supplied certain quantities less than seventy-five feet. In 1860, the plaintiff, a mill-owner, brought an action—1st count, for diverting the water; 3rd and 4th counts, claiming damages from the defendants for not supplying seventy-five cubic feet.—Defendants paid money into Court as to the 1st count; as to the 3rd and 4th they pleaded that the reservoir had not been finished so as to make it their duty to supply the water:—Held, that the plea was good, and the plaintiffs were only entitled to damages for the diversion of the water, and not for the non-discharge of seventy-five feet from the reservoir. "The plaintiffs did not think "fit to interfere by mandamus or injunction, but suffered the defendants to

"and wholesome water¹ for domestic purposes,² only where they
 "have laid down communication pipes, and paid or tendered the
 "water rate³ payable in respect thereof. Any owner or occupier

"intercept the water for more than
 "six years. Under the circumstances
 "plaintiffs are only entitled to damages
 "for getting less water from the natural
 "stream."—Pollock, C. B.

Sect. 43 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), enacts that, "if, except when prevented as
 "aforesaid (that is to say, by frost,
 "unusual drought, or other unavoidable
 "cause or accident, or during necessary
 "repairs (sect. 42)), the undertakers
 "neglect or refuse to furnish to any
 "owner or occupier entitled under this
 "or the special Act to receive a supply
 "of water during any part of the time for
 "which the rates for such supply have
 "been tendered, they shall be liable to
 "a penalty of 10*l.*, and shall also forfeit
 "to every person having paid or tendered
 "the rate, the sum of 40*s.* for every day
 "during which such refusal or neglect
 "shall continue after notice in writing
 "shall have been given to the under-
 "takers of the want of supply." By
 "sect. 74 of the same statute, it is pro-
 "vided that "if any person supplied with
 "water neglect to pay the water rate,
 "the undertakers may stop the water
 "from flowing into the premises, by
 "cutting off the pipe to such premises,
 "or by such means as the undertakers
 "shall think fit."

A tenant of premises supplied by a company with water having failed to pay the water rate, the company, under the powers conferred on them by sect. 74, severed the communication with their main pipes. A subsequent tenant demanded a supply of water for the same premises, tendering to the company the current quarter's rate, and the estimated expense of restoring the communication, but the company refused to supply the water until the arrears due from the former tenant were paid. A magistrate having convicted the company under sect. 43 of the Act for such refusal, it was held that, although the company were not warranted in refusing to supply water to the incoming tenant until the arrears due to them as above stated were paid, they could not be made liable to the penalties imposed by sect. 43 until he himself had restored the communication with their main pipes: *Sheffield Waterworks Co. v. Wilkinson*, 4 C. P. D. 411. See, too, *Purnell v. Wolverhampton New Waterworks Co.*, 10 C. B., N. S. 576; *Weale v. W. Middlesex Waterworks Co.*, 1 J. &

W. 358; 21 B. R. 183; *West Middlesex Waterworks Co. v. Suerkrop*, 4 C. & P. 87; *Cardiff (Mayor of) v. Cardiff Waterworks Co.*, 5 Jur., N. S. 953; *Bateman v. Ashton-under-Lyne*, 27 L. J. Ex. Ch. 458; 3 H. & N. 323; see also *Industrial Dwellings Co. v. East London Water Co.*, 58 J. P. 430; as to an injunction to restrain cutting off of water for non-payment of water rate see *Hayward v. East London Waterworks*, 28 Ch. D. 138; 54 L. J., Ch. 523, and *post*, p. 319 n. (1).

¹ Where under bye-laws made under a special Act, the undertakers, at the consumer's request and cost, laid down lead service and communication pipes between their mains and the plaintiff's house, which pipes were entirely under the control of the undertakers, and the water, which was pure and wholesome, in the mains became contaminated by the lead and poisoned the plaintiff, the House of Lords held, affirming the Court of Appeal, that the undertakers were not liable: *Milnes v. Huddersfield Corporation*, 11 App. Cas. 511; 56 L. J., Q. B. 1; 55 L. T. 617. *N. C.* in Court of Appeal, 12 Q. B. D. 443. As to supply of "pure and wholesome water" under a contract by a water company, see *Shaw's Water Co. v. Greenock Magistrates*, 2 Macq., H. L. 151.

² As to what are "domestic purposes," see *Bushy v. Chesterfield Waterworks*, El. Bl. & El. 176; 27 L. J., M. C. 174, and *ante*, Chap. III., p. 121. A supply to a fixed bath held to be water for "domestic purposes" under a special Act: *Weaver v. Cardiff Corporation*, 48 L. T. 906; held *not* to be water for "domestic purposes" under a special Act: *Walker v. Lambeth Waterworks Co.*, 63 L. J., Ch. 374; 8 R. 622; 71 L. T. 75 (1894). A "workhouse" is a house entitled to a supply for "domestic purposes": *Liskeard Union v. Liskeard Waterworks Co.*, 7 Q. B. D. 505; so is a "boarding house": *Pidgeon v. Great Yarmouth Water Co.*, (1901) K. B. D., 18 T. L. R. 97; so is water supplied to a school swimming bath. *Barnard Castle District Council v. Wilson*, (1901) 2 Ch. 813.

³ Sect. 3 of 10 & 11 Vict. c. 17 defines "water rate" as "any rent, reward, or payment to be made to the undertakers for a supply of water." See *Sheffield Waterworks Co. v. Wilkinson*, *supra*. With regard to the charges of water

“wishing to have water from the waterworks brought into his premises is empowered by the Act of 1847, upon paying or tendering the portion of water rate in respect of such premises, by that or the special Act directed to be paid in advance, to open the ground (having first obtained the consent of the owners and occupiers thereof) between the pipes of the company and his premises, and lay any leaden or other pipes from such premises, to communicate with the pipes of the undertakers The connection of the service pipes with the company's pipes must be made under the superintendence of their surveyor, and two days' notice of the hour and day when such connection is to be made, must be given to the company Any person who either has laid down service pipes, or has become the proprietor of them, is entitled to remove the same at any time after giving six days' notice in writing to the company; and he must make compensation to the company for any injury or damage to their pipes or works caused by such removal. . . . For the purpose, whether of laying or of removing such service pipes, any owner or occupier is entitled to open or

companies, it may be noted here that rent has been held to mean actual value where payment of rents is dependent on it. In *Sheffield Water Co. v. Bennett* (L. R., 8 Ex. 196, 1873) the defendant was the owner of various tenements, for which he paid poor rates, water rates, &c. By their Act the plaintiffs were bound to supply houses within a certain district with water at following rate per annum—i.e., where the rent was 7l., at not exceeding 6 per cent. Held, that in estimating the rents, defendant was entitled to deduct the rates so paid by him (affirming the same case in L. R., 7 Ex. 409). See, too, *Sidebottom v. Glossop Reservoir*, 1 Ex. 611 (Ex. Ch.); *Hook v. Liverpool (Mayor of)*, 7 C. B., N. S. 240. “Annual value” and “annual rack rent or value” for the purposes of water rate means “net annual value” or “rateable value,” not “gross estimated rental.” *Dobbs v. Grand Junction Waterworks Co.*, 9 App. Cas. 49; 53 L. J., Q. B. 50; 49 L. T. 541; *Warrington Waterworks Co. v. Longshaw*, 9 Q. B. D. 145; 51 L. J., Q. B. 498; 46 L. T. 815. “Annual rack rent and value” held to mean “gross estimated rental” under the Bristol Waterworks Acts, 1862, 1865 (*Bristol Waterworks Co. v. Uren*, 15 Q. B. D. 637; 54 L. J., M. C. 97; 52 L. T. 655), and the Barnet Gas and Water Act, 1872 (*Serens v. Barnet Gas and Water Co.*, 57 L. J., M. C. 82). See also as to “voids”

and “owner compounding for rates” *Smith v. Birmingham Corporation*, 11 Q. B. D. 195; 52 L. J., M. C. 81; 49 L. T. 25; as to annual value of a public-house see *West Middlesex Waterworks Co. v. Coleman*, or *Coleman v. West Middlesex Waterworks Co.*, 14 Q. B. D. 529; 54 L. J., M. C. 70; 52 L. T. 578; as to gardens see *Bristol Waterworks Co. v. Uren*, 15 Q. B. D. 637; 54 L. J., M. C. 97; 52 L. T. 655; *Grand Junction Waterworks Co. v. Davies*, (1897) 2 Q. B. 209; 66 L. J., Q. B. 633; 76 L. T. 833. For cases as to recovery of water rates see *East London Water Co. v. Kyffin*, (1895) 1 Q. B. 55; 64 L. J., M. C. 52; 15 R. 38; 71 L. T. 615; *East London Water Company v. Charles*, (1894) 2 Q. B. 730; 63 L. J., M. C. 209; 10 R. 435; 71 L. T. 200; *East London Water Company v. Kellerman*, (1892) 2 Q. B. 72; 67 L. T. 319; *Badcock v. Hunt*, 22 Q. B. D. 145; 58 L. J., Q. B. 134; 60 L. T. 314; *Chelsea Water Co. v. Paulst*, 52 J. P. 724; *Lea v. Abergareenny Improvement Commissioners*, 16 Q. B. D. 18; 53 L. T. 728; *Richards v. West Middlesex Water Co.*, 15 Q. B. D. 660; 54 L. J., Q. B. 551; *Southend Water Co. v. Howard*, 13 Q. B. D. 215; *Whiting v. East London Water Co.*, 1 Cab. & E. 331; *Direct Spanish Telegraph Co. v. Shepherd*, 13 Q. B. D. 202; 53 L. J., Q. B. 420; 51 L. T. 124; *Slater v. Burnley Corporation*, 59 L. T. 636; *Colne Valley Water Co. v. Treherne*, 50 L. T. 617.

"break up so much of the pavement of any street as shall be between the pipes of the company and his house, building, or premises, or any sewer or drain therein," but doing as little damage as possible. The owners of all dwelling-houses, or parts of dwelling-houses, occupied as separate tenements, where the annual value does not exceed 10*l.*, are liable to the payment of the water rates, instead of the occupiers thereof.¹

Parts of towns and districts not supplied with water are empowered to demand a supply from companies under the Act of 1847, if they comply with certain regulations; and a penalty is imposed on the company on their neglect or refusal to supply.² The undertakers are bound to keep a supply of water for public purposes, such as fire plugs,³ cleansing sewers, drains, &c., and for supplying public pumps. They are also authorized to provide a supply for trade and other purposes; and special regulations are made for the case where companies are employed to supply by meter.⁴ The Act of 1847 entitles them to the payment of water rates by those requiring a supply of water; but it also strictly limits their profits.⁵ By both the Waterworks Clauses Acts, the waste of water is prohibited by strict provisions.¹ The undertakers are required to keep a copy of their special Act at their office, and to deposit another with the

¹ Michael & Will, pp. lviii. *et seq.* See *Ward v. Folkestone Water Co.*, 24 Q. B. D. 334; 62 L. T. 321, as to screw-down valves to prevent waste. As to "unoccupied houses" under this section see *British Empire Assurance Co. v. Southwark and Vauxhall Co.*, 59 L. T. 321; *East London Water Co. v. Foulkes*, (1894) 1 Q. B. 819; 10 R. 243.

² As to exemption of a company on account of drought or unavoidable cause see *Industrial Dwellings Co. v. East London Water Co.*, 58 J. P. 430; and *ante*, p. 316, note.

³ As to this see *Reg. on the prosecution of the Wells Urban Sanitary Authority v. Wells Water Co.*, 55 L. T. 188; *Grand Junction Waterworks Co. v. Brentford Local Board*, 2 Q. B. 735; 63 L. J., Q. B. 717; 9 R. 788; 71 L. T. 240.

⁴ As to supply by meter of water for other than domestic purposes and meaning of "any consumer of water," and of "dwelling-house" under the New River Co.'s Act, 1852, see *Cooke v. New River Co.*, 14 App. Cas. 698; 59 L. J., Ch. 333; 61 L. T. 816; see also as to meters for baths, *Sheffield Water Co. v. Bingham*, 25 Ch. D. 443; 52 L. J., Ch. 624; 48 L. T. 604; *Sheffield Water Co. v. Carter*, 8

Q. B. D. 632; 51 L. J., M. C. 97. By sect. 41 of the New River Company's Act, the company shall at the request of any consumer of water for purposes other than those in respect of which rates are charged afford a supply by means of a meter, and charge the same at certain limited rates. The Metropolitan Board of Works demanded a supply of water by meter to water the Victoria Embankment during one-third of the year only:—Held, that the defendants were not bound to supply it at the limited rates, but might claim rates fixed by sect. 37 of the Waterworks Clauses Act, 1847: *Metropolitan Board of Works v. New River Co.*, 37 L. T., N. S. 124.

⁵ It is provided, "that the profits to be divided among the undertakers in any year shall not exceed 10 per cent. on the paid-up capital, unless a larger dividend be at any time necessary to make up the deficiency of any previous dividend which shall have fallen short of that rate." Michael & Will, p. lxxviii. Shares in waterworks are a legal estate and corporate inheritance: *Townsend v. Ash*, 3 App. Cas. 336.

clerk of the peace or sheriff clerk as aforesaid, for the inspection of all persons interested therein.¹

¹ Some of the principles regulating the duties of water companies may be here conveniently noticed. It is a primary duty where persons are by an Act of Parliament incorporated for a special purpose with full powers for executing it, that the body thus created should from time to time take measures to prevent the occurrence of any inconvenience or injury which the effecting such purpose may occasion, not only in the original execution of the necessary works, but at recurring intervals.

Thus, where a company incorporated for supplying mill-owners on the Bann were empowered to make a reservoir, and to send the water, when necessary, down a special channel, and also to enter on the lands of different streams, and to scour the channels, it was held, that they were responsible for damage caused by an overflow arising from their neglecting to keep the special channels scoured, since they were bound under the Act to see that the due execution of their works should not be injurious to the lands on the banks of the channel: *Geddis v. Bann Reservoir*, 3 App. Cas. 430 (H. L. Ir.); see *ante*, p. 269.

So, too, it is incumbent (under the Waterworks Clauses Act, 1847, sect. 31) on a water company intending to break up roads to communicate beforehand the plan to the road authority, and this is sufficient to enable the road authority to judge whether it requires any modification, and it rests with the water company, in case of its disapproval, to apply for the determination of two justices before proceeding to commence operations: *Edgemore Highway Board v. Colne Valley Water Co.*, 46 L. J., Ch. 889.

With regard to questions of compensation for injuries to land which may arise with reference to the Lands Clauses Act, 1845, a company would appear to be bound by the terms of their agreement, even though they fail to carry them out in entirety. On this point *Stone v. Corporation of Yeovil* (2 C. P. D. 99) is instructive. There the defendants, a water company, were empowered by an Act incorporating the Lands and Waterworks Clauses Acts to take, use and divert certain streams, and, amongst others, that of the plaintiff, a mill-owner. Defendants gave plaintiff notice of their intention to take all the stream, but actually took half only. To a statement of claim by the plaintiff for 939*l.* permanent damages awarded to him by a surveyor for

the abstraction of the whole stream, the defendants demurred, on the ground that they had no power to agree to make compensation for all the stream, but only for such damage as was done from time to time. It was held, however (affirming the decision in the Common Pleas Division), that they had such power, and that, having given notice of an intention to purchase the whole, they were bound to make compensation at once for all the interest of the mill in the stream. It was further held that, if the case was to be considered as one of injuriously affecting property, the statement showed a good agreement by a limited owner for permanent injury under sects. 9 and 68.

In cases of disputes regarding the payment of rates, sect. 68 of the Waterworks Clauses Act, 1847, provides that the question of annual value is to be determined by two justices. This provision would appear to override anything to the contrary in any private Act incorporating it. Sect. 46 of the New River Act, which incorporates the Waterworks Clauses Act, enacted "that nothing in this Act, or any Act incorporated therewith, is to prevent the company from recovering any sum not exceeding 50*l.*, due as water rates, &c., by an action as provided." But it was held in *The New River Co. v. Mather* (L. R., 10 C. P. 442; 44 L. J., M. C. 105; 32 L. T. 658), that where a *bond fide* dispute as to value arises, the company, before they can sue, must obtain a decision of justices; and *ante*, p. 314. n. (4).

Closely connected with the duty incumbent on companies to prevent injury, noticed above, is the question of responsibility for mischief caused through negligence; *ante*, pp. 150 *et seq.*, 268 *et seq.*

In an action against a water company for so managing their pipes that they burst, and, water escaping, injured the plaintiff's premises, it was shown that there was an extraordinary frost, and that the turncock had examined the plug, and packed it with straw and ice on the 29th November: it was doubtful, however, whether he had looked at it after. It burst on the 29th December. Held, that there was some evidence of negligence to go to the jury: *Steggles v. New River Co.*, 13 W. R. 413.

In *Harrison v. Great Northern Rail. Co.* (10 Jur., N. S. 992) the defendants were charged with the duty of repairing a drain, the outlet of which was in a channel under the management of

Duties of
Water
Companies.

Such are a few of the main provisions relating to companies having parliamentary powers. We go on to notice more briefly—

Companies having no parliamentary powers.

(2) *Companies having no parliamentary powers.*—Where such bodies undertake to supply water it is to be noted that they lay their pipes in streets and public ways at their peril, being liable

commissioners bound to keep it clear, and of certain dimensions. Owing to an extraordinary rainfall, the drain burst, and it was held that defendants were liable, although there was an obligation on others which they did not perform; Pollock, C. B., observing, *inter alia*, that “there was nothing in the matter of so “extraordinary a character as that the “defendants were not bound to anticipate it. The storm, though unusual “and extraordinary in a sense, yet as “happening once a year, or in a few “years, was not unusual. This is not a “case of a sudden wrong done by others “in stopping the outlet. It is a permanent long-continuing state of things “which it was the duty of defendants “to guard against.”

In order to meet the charge of negligence, a plea must be express and not too general. Thus where damages were claimed by a plaintiff from the East London Waterworks Company for neglect in supplying him with water, they being bound, under sect. 79 of their Act, to supply water by measure at the request of owners of premises for purposes other than those in respect of which rates were paid, it was pleaded by the company:

1st. That the fire-plug in the main pipe was open to put out a fire.

2nd. That they were prevented by an unavoidable accident.

It was held on demurrer that the first plea was a good answer, but the second was bad, as too general: *Campbell v. East London Waterworks*, 26 L. T., N. S. 475.

Where, however, a water company have observed the directions in their Act of Parliament in laying down their pipes, they are not liable for an escape of water not caused by their own negligence, and the fact that their precautions were not sufficient in an exceptional circumstance (as, for instance, a winter of extreme cold, such as no man could have foreseen) will not render them so: *Blyth v. Birmingham Water Co.*, 11 Ex. 781. As to *res major*, see *ante*, pp. 150 *et seq.*

Again, no action at common law lies against the owner of land by a person who has strayed from the public highway, and fallen into a reservoir or any

excavation near to but not substantially adjoining it: *Hurdcastle v. South York Rail. Co.*, 4 H. & N. 67.

A company claiming a statutory power to take land compulsorily is bound to prove distinctly from the Act of Parliament the existence of the power, and where there is a doubt, the landowner is to have the benefit of it. When, as is often the case, a special Act incorporates a general Act, it is to the special Act that reference must be made in order to ascertain the contract between the landowner and the company. A water company incorporated by a special Act incorporating the Lands and Waterworks Clauses Acts deposited plans showing their intention to make a tunnel through the plaintiff's land forty-five feet below the surface. They also claimed to hold the land permanently for other purposes, namely, to erect steam engines and sink wells. Held, per Lord Westbury, L. C., they were not entitled to do so: *Simpson v. South Staffordshire Waterworks*, 11 Jur., N. S. 453; 34 L. J., Ch. 380.

It may be convenient to note here that the principle that a grantor knowing the purposes for which his conveyance is accepted cannot derogate therefrom, applies to a compulsory sale by Act of Parliament; but that such principle does not apply to an accidental state of circumstances, such as the flooded state of a mine at the time of the conveyances: *N. E. Rail. Co. v. Elliot*, 6 Jur., N. S. 817; 10 H. L. Cas. 333.

It would appear that a water company has no right to interfere with the sale of water for a profit so supplied by them to a township, where the agreement merely stated that the company should supply not more than 75,000 gallons, nor less than 25,000, and the township took more than 25,000 gallons, and sold the surplus; *Halifax v. South Hill*, 31 L. T., N. S. 6.

It has been decided that a water company has no claim to compensation for interest in land under sect. 68 of the Lands Clauses Act, 1845, because their pipes are laid under such land: *New River Co. v. Midland Rail. Co.*, 36 L. T., N. S. 539. See, too, *Ward v. Wolverhampton Waterworks Co.*, 41 L. J., Ch. 308; *Cloves v. Staffordshire Potteries Waterworks Co.*, 27 L. T., N. S. 521.

to an indictment¹ or action for damages, joined with a claim for an injunction at the instance of any individual whenever they break up or obstruct a highway.² They have also no power to acquire lands and water, or to levy tolls or charge rates or rents, save by agreement.³

Both projected companies and those already existing³ can, however, by means of *The Gas and Water Facilities Act, 1870* (33 & 34 Vict. c. 70),⁴ obtain certain powers for supplying water.

Sect. 3 provides that the Act may apply where powers are required "to construct or to maintain and continue waterworks and works connected therewith, or to supply water in any district within which there is not an existing company, corporation, body of commissioners, or person empowered by Act of Parliament to construct such works and to supply water" (sub-sect. 2). By sub-sect. 3 additional capital can be raised for any of these purposes, and under sub-sect. 4, "two or more companies or persons duly authorized to supply gas or water in any district, or in adjoining districts," may "enter into agreements jointly to furnish such supply, or to amalgamate their undertakings." Lastly, by sub-sect. 5, "two or more companies or persons supplying gas or water in any district, or in adjoining districts," can be authorized "to manufacture gas or to supply water, and to enter into agreements jointly to furnish such supply and to amalgamate their undertakings." "Such purposes, or any one or more of them, as the case may be, shall, for the purposes of this Act, be deemed to be included in the term 'gas undertaking,' or 'water undertaking,' according as the same relate to the supply of gas or water; provided that any gas or water company empowered as aforesaid may apply for and avail themselves of the facilities of this Act within their own districts respectively."

Provisional orders (to be subsequently confirmed by Parliament (sect. 9)) can be obtained in any district by any company, association, or person for carrying out the above purposes (sect. 4), the Board of Trade being empowered to consider any application

¹ *Reg. v. Longton Gas Co.*, 2 El. & El. 651; *Preston (Mayor of) v. Fulwood Board*, 57 L. T. 719.

² *Goodson v. Richardson*, L. R., 9 Ch. 221.

³ *Michael & Will*, p. lvi.; as to an agreement to purchase water for mining purposes, see *Kimberley Water Co. v.*

De Beers Consolidated Mines, (1897) App. Cas. 515; 66 L. J., P. C. 108; 77 L. T. 117, P. C.

⁴ "An Act to facilitate in certain cases the obtaining of powers for the construction of Gas and Waterworks, and for the supply of Gas and Water."

or objection thereto (sect. 6), and if it be deemed expedient to make the provisional order. The *Waterworks Clauses Acts*, 1847 and 1863, and the *Lands Clauses Consolidation Acts* of 1845 and 1860, are, by sect. 10,¹ to be incorporated with such provisional order, save where varied thereby.

This enactment was amended by 36 & 37 Vict. c. 89 (*The Gas and Waterworks Facilities Act*, 1870, *Amendment Act*, 1873),² by sect. 12 of which the Board of Trade may amend and extend or vary provisional orders, and by sect. 15 of which the Act is not to extend to the metropolis as defined by *The Metropolis Management Act*, 1855. It remains to notice a few points respecting—

Local authorities supply-
ing water.

10 & 11 Vict.
c. 34.

11 & 12 Vict.
c. 63.

(3) *Local authorities empowered to supply water*.—10 & 11 Vict. c. 34 (*The Towns Improvement Clauses Act*, 1847),³ made some provision in this respect (sects. 121—124), and incorporated *The Lands Clauses Consolidation Act*, 1845 (sect. 19). It was, however, superseded as regards water by 11 & 12 Vict. c. 63 (*The Public Health Act*, 1848), under which local authorities were empowered under certain circumstances and conditions to supply their districts with a proper and sufficient supply of water for the purposes of the Act, and might, for that purpose, contract from time to time with any person whomsoever, or purchase, take on lease, hire, construct, lay down and maintain such waterworks, and do and execute all such works, matters and things as may be necessary for those purposes (sects. 75—80). Local authorities might, by agreement, purchase land, and the Act incorporated *The Lands Clauses Consolidation Act*, 1845 (sect. 48), excepting such enactments as related to the purchase and taking of lands otherwise than by agreement.⁴

21 & 22 Vict.
c. 98.

These powers were supplemented by 21 & 22 Vict. c. 98 (*The Local Government Act* of 1858),⁵ which (by sect. 75) incorporated the whole of the *Lands Clauses Consolidation Act*, except the provisions relating to access to the special Act; and provided the

¹ Cf. sect. 1 of 33 & 34 Vict. c. 70. Sect. 10 excepts, so far as regards the incorporation of the *Lands Clauses Consolidation Acts*, the provisions (1) with respect to the purchase and taking of lands, otherwise than by agreement; and (2) with respect to the entry upon lands by the promoters of the undertaking.

² "An Act to amend the provisions of "the Gas and Waterworks Facilities Act, "1870."

³ "An Act for consolidating in one "Act certain provisions usually con-

"tained in Acts for paving, draining, "cleansing, lighting, and improving "towns."

⁴ Cf. Michael & Will, p. lxviii.

⁵ "An Act to amend the Public "Health Act, 1848, and to make further "provisions for the local government of "towns and populous places." Sects. 51 —53 deal specially with water. The Act was amended by the *Local Government Act*, 1858, *Amendment Act*, 1861 (24 & 25 Vict. c. 61).

machinery for enabling local authorities to put in force the powers of that Act, as regards the compulsory acquiring of land, by obtaining a provisional order, to be afterwards confirmed by Parliament. This Act was further amended by 24 & 25 Vict. c. 61.

*The Sanitary Acts of 1866 and 1874*¹ extended to sewer authorities the powers given to local boards; the latter statute incorporating the powers of the Lands Clauses Act, and authorizing sanitary authorities to purchase, either within or without their districts, any land covered with water, or any water, or right to take or convey water² (sects. 31—33). 29 & 30 Vict.
c. 90;
37 & 38 Vict.
c. 89.

The Public Health Act, 1875 (38 & 39 Vict. c. 55), amended by *The Public Health Act, 1878* (41 & 42 Vict. c. 25), repeals all the statutes noticed above, consolidating, and, in some respects amending, the law.³ 38 & 39 Vict.
c. 55.

By sect. 51, urban authorities may provide their district or any part thereof, and any rural authorities may provide their districts or any contributory place therein, or any part of such place, with “a supply of water proper and convenient for public “and private purposes,” and for these purposes or any of them may—

(1) Construct and maintain waterworks, dig wells,⁴ and do all other necessary acts;

(2) Take on lease or hire any waterworks, and, with the sanction of the Local Government Board, purchase any waterworks or any water or right to take or convey water either within or without their district, and any rights, powers, and privileges of any water company; and

(3) Contract with any person for a supply of water.⁵

¹ 29 & 30 Vict. c. 90, Sanitary Act, 1866 (ss. 11—13); 37 & 38 Vict. c. 89, the Sanitary Law Amendment Act, 1874.

² But the compulsory powers of purchase contained in the said Lands Clauses Act shall not be exercised, except in pursuance of a provisional order of the Local Government Board (sect. 33).

³ Michael & Will, pp. lxxiv.—lxxxiii.

⁴ As to Public Wells, see *ante*, p. 178.

⁵ Their powers are, however, limited in that where there exists a water company empowered by Act of Parliament, or any order confirmed by Parliament, to supply water within the district of the local authority, and exercising such powers within the limits of their special Act,

local authorities must give written notice to any such water company, within whose limits of supply they are desirous to supply water, before beginning to construct; and so long as any company are able and willing to supply water, proper and sufficient for all reasonable purposes for which it is required by the local authority, it is not lawful for the latter to construct any waterworks within such limits (sect. 52).

A local authority may, notwithstanding sect. 52 of the Public Health Act, 1875, construct and use waterworks for the supply of water for their use only in the district of a water company able and willing to supply such water.

Local authorities are given full powers (sects. 175—181) to purchase lands and easements by agreement, for the purposes of the Act, either within or without their districts, but must obtain a provisional order for the purpose (sect. 176), unless they have acquired by agreement the necessary lands and easements for their waterworks;¹ and in order to do this they must publish the same notices by advertisement in the local papers, and serve the same notices² on owners, lessees, and occupiers, as if they were proceeding for an Act of Parliament (sect. 176). Water companies are empowered to contract to supply water, or lease their waterworks to any local authority, or to sell and transfer to such authority on such terms as may be agreed on all the rights, powers, privileges, and all or any of the waterworks, premises, and other property of the company, but subject to all liabilities to which the same are subject at the time of such purchase. The duty of providing a pure and wholesome supply of water³ is imposed on local authorities (sects. 55, 176), and they have now all the powers of *The Waterworks Clauses Act, 1863*, and many of those of *The Waterworks Clauses Act, 1847*—such, for instance, as those relating to the breaking up of streets for the purpose of laying pipes,⁴ the laying of communication pipes, and the waste and misuse of water and recovery of water rates.⁵

Works erected and maintained by a local authority to provide the water necessary to carry out a scheme for the disposal of sewage of its district, are not "waterworks" within the meaning of sect. 52, as defined by sect. 4 of the Public Health Act, 1875; nor can the local authority be said to be supplying water within the meaning of those sections. There is no provision in the Waterworks Clauses Act, 1847, which compels a local authority to take water to "cleansse sewers" from a water company within whose limits of supply the sewers are situate: *West Surrey Water Co. v. Chertsey Union*, (1894) 3 Ch. 513; 63 L. J., Ch. 806; 71 L. T. 368.

Differences as to being able and willing to supply to be settled by arbitration; see sects. 52 and 179—181; and cf. sects. 53, 54, for provisos as to notice.

¹ Sect. 4 defines "lands" as "messuages, buildings, lands, easements, and hereditaments of any tenure;" but as this definition does not include water rights, local authorities must obtain a private Act, and not a provisional order, where their intended waterworks involve the abstraction of water from rivers, streams, &c.; sect. 176; see Michael &

Will, pp. lxxvii., 444.

² Such notices only apply to new waterworks, and not to additions and alterations of existing works: *Cleveland Water Co. v. Redcar Local Board*, (1895) 1 Ch. 168; 64 L. J., Ch. 64; 13 R. 18.

³ See *ante*, p. 316, n. (1).

⁴ As to the right to break up a private road, see *Hill v. Wallasey Local Board*, (1894) 1 Ch. 133; 7 R. 51; 63 L. J., Ch. 1; 69 L. T. 641.

⁵ The following provisions are noteworthy:—They may supply water by measure (sect. 58), and supply baths and washhouses (sect. 65). The duty is imposed on them of supplying fire-plugs (sect. 66), and watering streets (sect. 148). But the Waterworks Clauses Act, 1847, and the Public Health Act, 1875, impose no obligation on an urban local authority to bear the expense of maintaining in repair the fire-plugs in their district, unless such fire-plugs have been fixed by them, or by some water company or person at their request: *Grand Junction Waterworks Co. v. Brentford Local Board*, (1894) 2 Q. B. 735; 63 L. J., Q. B. 717; 9 R. 788; 71 L. T. 240; 59 J. P. 51 (C. A.). Sect. 64 vests in them

The above brief sketch of the statutes dealing with water supply may be fitly concluded by a mention of the following enactments which are connected with the subject. Other enactments.

14 & 15 Vict. c. 34 (*The Labouring Classes Lodging Houses Act*, 1851) authorizes water companies and commissioners or trustees of waterworks or other persons having the management thereof, to supply in their discretion water to lodging houses established under the Act, "either without charge, or on such "other favourable terms as they shall think fit."¹ 14 & 15 Vict. c. 34.

35 & 36 Vict. c. 91 (*The Municipal Corporations (Borough Funds) Act*, 1872) provides for the manner in which local authorities must proceed in order to oppose or promote any bill in Parliament.² 35 & 36 Vict. c. 91.

38 & 39 Vict. c. 86 (*The Conspiracy and Protection of Property Act*, 1875) is noteworthy as containing provisions to protect local authorities and communities from malicious breaches of contract in connection with water supply.³ 38 & 39 Vict. c. 86.

The Limited Owners' Reservoirs and Water Supply Further Facilities Act, 1877 (40 & 41 Vict. c. 31), enables landowners of limited interest to construct waterworks and charge their estates with sums expended by them thereon, as well as to charge their estates with sums subscribed by them for the construction of waterworks by a water company, on the same conditions and terms as those on which they can now charge them with subscriptions for the construction of railways and navigable canals under *The Improvement of Land Act*, 1864, sects. 6, 7, 8, &c.⁴ 40 & 41 Vict. c. 31.

The Public Health (Water) Act, 1878 (41 & 42 Vict. c. 25), which amends sect. 62 of *The Public Health Act*, 1875 (38 & 39 Vict. c. 55) 41 & 42 Vict. c. 25.

all existing public cisterns, pumps, wells, &c., and places them under their control; and sect. 61 empowers local authorities to supply water to the districts of other authorities. See also sects. 68—70, as to provisions for the protection of water; sects. 270 and 279, as to the formation of united districts for water supply; and sects. 229, 277, as to special drainage districts, for the purpose of charging thereon exclusively the expense of works; cf. Michael & Will, pp. lxxv.—lxxxviii.

By sect. 52, it is required that a water company, contracting to supply a district, must be both "able and willing"; and such company must be able therefore to show not only that it has the necessary powers, but also that it can furnish the requisite supply of water.

Where there were two companies, one of which had powers, but no water, and the other water, but no powers, and the first company sold its plant, &c., to the other, several members of which bought all the shares in the first, with the view of exercising all its powers, it was held that such powers could not be so delegated; *Richmond and Southwark Waterworks Co. v. Richmond Vestry*, 3 Ch. D. 82.

¹ Michael & Will, p. lxvi.

² Ibid. p. lxxxiv.

³ Ibid. p. lxxxiii., "An Act for amending the Law relating to Conspiracy and to the Protection of Property, and for other purposes;" sects. 4, 5, 14, 15, 18, 19.

⁴ 27 & 28 Vict. c. 114.

as to the meaning of the term "reasonable cost" (sect. 8), and is to be construed as one with that Act, imposes the duty of providing or requiring the provision of a sufficient water supply for their district upon rural sanitary authorities¹ (sect. 3), and requires them "from time to time to take such steps as may be "necessary" to ascertain its condition (sect. 7). Sect. 6 prohibits the erection or rebuilding of houses without a sufficient water supply in rural districts. By sect. 10 urban sanitary authorities are empowered to charge water rates on the application of any ten persons rated to the relief of the poor in their district; and by sect. 11 the Local Government Board may, by order, invest them with all or any of the duties given by the Act to rural sanitary authorities.

56 & 57 Vict.
c. 73.

The Local Government Act, 1894 (56 & 57 Vict. c. 73), also empowers parish councils to "utilize any well, spring, or stream "within their parish and provide facilities for obtaining water "therefrom, but so as not to interfere with the rights of any "corporation or person" (sect. 8 (1) (c)); but it is provided by sub-sect. 3 of this section that nothing therein "shall derogate "from any obligation of a district council with respect to the "supply of water or the execution of sanitary works."

London
Water Com-
panies.
15 & 16 Vict.
c. 84.
34 & 35 Vict.
c. 113.

In addition to their special Acts, London water companies are subject to the provisions of two general Acts—15 & 16 Vict. c. 84 (*The Metropolis Water Act, 1852*), and 34 & 35 Vict. c. 113 (*The Metropolis Water Act, 1871*), which amends the first-named statute, and is to be read together with it. Sect. 1 of the Act of 1852 prohibits companies supplying the Metropolis from taking water from the Thames below Teddington Lock or from any part of its tributary rivers or streams below the highest point where the tides flow. Reservoirs within a straight line of not more than five miles from St. Paul's Cathedral are to be covered (sect. 2); no water may be brought into the Metropolis by means of open aqueducts (sect. 3); and by sect. 4 every company must effectually filter all water for domestic use before passing it into the pipes for distribution. Companies are required by sect. 5 to give notice to the Board of Trade before resorting to new sources of supply, which may only be used subject to the certified approval of the Board after an examination of such sources by their inspector (sects. 6, 7, 8); and the Board is also empowered on the complaint of any person as to

¹ See as to this *Colne Valley Water Co. v. Treherne*, 50 L. T. 617.

the quantity or quality of the water supplied by any company for domestic purposes to appoint a person to inquire into the subject and examine and inspect the waterworks of the company for the purpose (sects. 9—13). By sect. 15 every company is required, subject to the provisions of its special Act, to “provide and keep “in the district mains already laid down or hereafter to be laid “by them a constant supply¹ of pure and wholesome water sufficient for the domestic use of the inhabitants of all houses supplied “by such company, at such pressure as will make the water reach “the top storey of the highest of such houses, but not exceeding “the level prescribed by the special Act of such company;” and infringement of this provision is punishable by a fine of 200*l.*, and a further fine of 100*l.* for every month of non-compliance therewith (sect. 16). The Act also empowers companies by sect. 26 to make regulations for preventing waste of water, and provides, *inter alia*, for the keeping by companies of maps of the mains, &c. (sects. 17, 18); the preparation by them of yearly abstracts of receipts and expenditure of water rates (sect. 19); and the proper construction of cisterns as respects overflow, and the exclusion of impure water (sects. 22, 23).

By sect. 3 of the Act of 1871 the term “company” is defined to include the “New River,” the “East London,” the “Southwark and Vauxhall,” the “West Middlesex,” the “Lambeth,” the “Chelsea,” the “Grand Junction,” and the “Kent” Water companies, “and also any other corporation, company, board, “commissioners, association, person, persons, or partnership for “the time being supplying water for domestic use within the “limits of this Act, and the expression ‘water limits’ with “respect to a company ‘shall mean such parts of the limits “‘within which such company is authorized to supply water as “‘are within the limits of this Act.’” The Board of Trade is empowered to require companies at any time to provide a constant supply within the water limits of any district where it is shown that the metropolitan authority refuses to apply for such supply, or that the health of the inhabitants is prejudicially affected by its insufficiency or unwholesomeness (sects. 11—13); and the Board is also authorized to deal with the question of supply where groups of dwelling-houses are situate in courts and passages. Sect. 17 requires water companies to make regulations

¹ A private person cannot take proceedings for penalties imposed for not providing a “constant supply”—only

the metropolitan authority for the district: *Kyffin v. East London Waterworks Co.*, (1896) 1 Q. B. 446; 65 L. J., M. C. 60.

as to the prevention of waste under sect. 26 of the Act of 1852, within six months after the passing of the Act, and extends the application of that section to the prevention of undue consumption or contamination of water, and provision is made for the amendment of such regulations when necessary (sects. 18, 19), and their enforcement by penalties not exceeding 5*l.* for offences against them (sect. 20). Among other provisions of the Act may also be noticed sect. 35, which empowers the Board of Trade to appoint persons to inquire into and report on the quality of water furnished by companies irrespective of any complaint by householders under sect. 9 of the Act of 1852; and sect. 36, which provides for the appointment of "a competent and impartial person" by the Board as "water examiner," charged with the duties of examining, when directed, the water supplied by any company, in order to ascertain whether such company has complied with the requirements of sect. 4 of the Act of 1852, with respect to the filtration of water.

54 & 55 Vict.
c. 72.

By sect. 48 (1) of *The Public Health (London) Act, 1891* (54 & 55 Vict. c. 72), sects. 48—54 of which relate especially to water, an occupied house without a proper and sufficient supply of water shall be a nuisance liable to be dealt with summarily under the Act, and, if a dwelling-house, is to be deemed "unfit for human habitation." The sanitary authority is empowered to make bye-laws for securing the cleansing of cisterns (sect. 50), to maintain public cisterns, reservoirs, wells, fountains, pumps, and works used for the gratuitous supply of water (sect. 51), and, on the representation of persons in their district, to close wells, tanks, and cisterns, &c., so polluted as to be injurious to health (sect. 54); and water companies which are authorized to cut off the water supply of dwelling-houses for the non-payment of rent are required to give notice of such closing to the sanitary authority within twenty-four hours after exercising their right¹ (sect. 49). Sect. 52 imposes penalties for causing water to be corrupted by gas washings, and sect. 53 for fouling or maliciously damaging the water of wells, fountains, and pumps used for drinking or domestic purposes.

Rateability.

The rateability of water companies will be treated of in a subsequent chapter.²

¹ Turning off water to prevent waste through a leak is not "cutting off" under this section so as to require notice: *Young v. Southwark and Vaux-*

hall Water Co., (1893) 5 R. 432; 69 L. T. 144.

² See *post*, Chap. IX.

III. *Docks.*

Docks¹ usually consist of a series of basins connected by locks, together with quays, wharves, and warehouses, and are used for the convenience of unloading cargoes from vessels, as well as for refitting and repairing ships that have sustained damage during a voyage. Definition.

Though they are always erected in connection with some port or harbour, they are quite distinct therefrom; the property in a port, and that in the docks situated within the town, which is the head of the port, being frequently in different persons, as is the case both in the Liverpool and the London Docks.² Ownership of.

They may be in the hands either of trustees for the public benefit,³ or of a company of adventurers;⁴ but in each case they are usually established under a special Act of Parliament, by which the rights and duties of the proprietors are defined; and when that is the case, such rights cannot be exceeded.⁵ When the Act is silent on this point, the public have a right to enjoy the privilege of using the docks upon "reasonable terms," and the owner cannot impose what tolls or duties he pleases on them.⁶

The number of special Acts relative to docks led to the passing of *The Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 Vict. c. 27),⁷ the preamble of which recites that "it is expedient to comprise in one Act sundry provisions usually contained in Acts of Parliament authorizing the construction or improvement of harbours, docks, and piers, and that, as well for avoiding the necessity of repeating such provisions in each of the several Acts relating to such undertakings, as for ensuring a greater uniformity in the provisions themselves" (sect. 1). By this statute, which is framed on the model of the Lands Clauses

10 & 11 Vict.
c. 27.

¹ As to ports, harbours, and docks, see also *ante*, Chap. I. p. 50.

² Gunning on Tolls, p. 129.

³ *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; 35 L. J., Ex. 225; 14 L. T. 677.

⁴ *Reg. v. Bristol Dock Company*, 2 Railw. Cas. 599.

⁵ Gunning on Tolls, p. 123.

⁶ *Allnut v. Inglis*, 12 East, 527; 11 R. R. 482, and see Gunning, p. 123. For the subject of dock dues, see *post*, Chap. IX.

⁷ The following other general statutes apply to docks.

By 28 & 29 Vict. c. 106, the Admiralty were empowered to draw a sum of

300,000*l.* from the Consolidated Fund as a loan for constructing docks in British possessions in 1865.

The Bank Holiday Acts (34 & 35 Vict. c. 17; 38 & 39 Vict. c. 13; 39 & 40 Vict. c. 36, s. 8) apply to persons employed in docks.

By 24 & 25 Vict. c. 96 (the Larceny Act, 1861), s. 63, stealing from docks, or ships lying therein, is made a felony, punishable by penal servitude or imprisonment. Setting fire to or injuring docks are also constituted felonies by sects. 4, 30, and 31 of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97).

and Waterworks Clauses Consolidation Acts, various provisions usually contained in Acts creating dock companies are consolidated, and it extends to such "harbours, docks, and piers as "shall be authorized by Acts hereafter to be passed, which shall "declare that this Act shall be incorporated therewith" (sect. 1); the term "*the undertakers*" being defined by sect. 2 to mean "any person authorized by a special Act to construct any "harbour, dock, or pier."¹

By sect. 83, the undertakers authorized by any special Act to construct a dock may from time to time make such bye-laws as they shall think fit for (amongst other purposes) regulating the shipping, unshipping, and removing of all goods within the limits of the dock, and for regulating the duties and conduct of all persons, as well the servants of the undertakers as others, employed in the dock.²

It is, however, to the special Act that reference must be made, to ascertain the rights of the dock proprietors; that Act constituting the form of contract³ between them and the public, and being regarded in the light of a bargain, any ambiguity in its terms will be construed as against the undertakers and in favour of the public.⁴

¹ A barge propelled by oars only is not a vessel within the 3rd section of 10 Vict. c. 27, and the 100th and 101st sections of 27 & 28 Vict. c. 178 (London and St. Katherine's Docks Co. Act, 1864 (local)), so as to render the owner liable to the penalty imposed by the latter Act, as being the owner of a vessel left in the Royal Albert Docks without any person on board: *Hedges and Sons v. London and St. Katherine Docks Co.*, 55 L. J., M. C. 46; 16 Q. B. D. 597; 54 L. T. 427.

The 63rd section, which imposes a penalty upon the master of any vessel who shall without permission of the harbour-master moor the same in the entrance (or within the prescribed limits) of any dock or harbour, and who shall not remove the same upon notice, overrides and extinguishes all local and private rights of property therein. The assertion of such local or private rights does not exclude the jurisdiction of the justices under the Act: *Gardner v. Whitford*, 4 C. B., N. S. 665.

For other general statutes relating to docks, see *ante*, Chap. I. p. 50; and *post*, Chap. VII.

² A dock company, who were the undertakers under a special Act, made bye-

laws that no lumpers should be allowed to work on board any vessel in the dock but such as were authorized by the company, unless permission in writing had been previously obtained from the superintendent of the dock, and that the servants of the company only should be allowed to work within the dock premises whether on ship, lighter, or shore:—*Held*, that the bye-laws were in excess of the power conferred on the dock company by sect. 83, and were therefore invalid: *Dick v. Buddart*, 10 Q. B. D. 387; 84 L. T. 391. As to effect of regulations not confirmed as bye-laws under this section see *London Association of Ship-owners v. London and Indian Docks*, (1892) 3 Ch. 242; 67 L. T. 238; 7 Asp., M. C. 195.

³ A contract for the use of a dock between the owners and the public is not an interest in land within the 4th section of the Statute of Frauds, and does not require to be under seal: *Wells v. Kingston-on-Hull Corporation*, L. R. 10 C. P. 402; 44 L. J., C. P. 257; 52 L. T. 615.

⁴ *Hull Dock Co. v. La Marche*, 8 B. & C. 51; 32 R. R. 337. See too *Leeds and Liverpool Canal v. Hustler*, 1 B. & C. 424; 36 R. R. 746, 748; Lord

By Act of Parliament, the Hull Dock Company were authorized to make a dock, &c., and all goods which should be landed or discharged upon any of the quays, &c., should be liable to pay the like rates of wharfage as were usually taken for goods, &c., loaded or discharged on quays in the port of London. It was held, that as the premises were only vested in the company for the purposes of the Act, they had no common law right to compensation for the use of them, and that the statute did not give them any right to claim wharfage for goods shipped off from their quays; Lord Tenterden, C. J., saying, "The plaintiffs cannot claim any thing that is not distinctly given."¹

The principle on which a private person or a company is liable for damages occasioned by the neglect of servants² applies to a corporation which has been entrusted by statute to perform certain works (as, for instance, to erect and manage docks), and to receive tolls for the use of the works; although these tolls, unlike tolls received by a private person, are not applicable to the use of individual members of the corporation, or to that of the corporation generally, but are devoted to the maintenance of the works, and, in case of any surplus existing, the tolls are themselves to be diminished. If knowledge of the existence of a cause of mischief makes persons responsible for an injury, they will be equally responsible when, by their culpable negligence, its existence is not known by them.³

Liability of
dock com-
panies.

On these principles, dock authorities are liable to the owners

Tenterden's remarks in *Stourbridge Canal v. Wheely*, 2 B. & Ad. 793; 36 R. R. 746; *Blakemore v. Glamorgan-shire Canal*, 1 M. & K. 162, 169; 36 R. R. 289; and Lord Brougham's judgment in *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641.

¹ *Kingston-on-Hull Dock Co. v. La Marche*, 8 B. & C. 42; 32 R. R. 337.

² A dock-master exercises an exclusive control and direction over the movements and navigation of vessels entering, using or quitting the docks owned by the corporation whose servant he is. The dock authority, whether it be a corporation trading for profit, e.g. a dock company, or a public body having merely the power of levying tolls on shipping using the port and applying them for the benefit of the port, e.g., the Mersey Docks and Harbour Board, is liable for the acts and defaults of its servants and for the proper condition of its

docks (*Thompson v. N. E. Ry. Co.*, 2 B. & S. 106; *Lancaster Canal Co. v. Parnaby*, 11 Ad. & E. 223; *Mersey Docks v. Gibb*, L. R., 1 H. L. 93); Renton's *Encyclopædia of the Laws of England* (p. 318).

With respect to the duties of a dock-master and liabilities of the dock company employing him see *The Excelsior*, 57 L. J., Adm. 54; L. R. 2 A. & E. 268; 19 L. T. 87; *Lloyd v. Iron*, 4 F. & F. 101; *Keney v. Kirkcudbright Magistrates*, 61 L. J., P. C. 23; (1892) A. C. 264; 61 L. T. 474; 7 Asp., M. C. 221, H. L. (Sc.); *Duckham v. Gibb*, 69 L. J., Q. B. 127; (1900) 1 Q. B. 394; 48 W. R. 239; *The Apollo*, (1891) App. Cas. 499; *The Bilbao*, Lush. 149; *The Cynthia*, 2 P. D. 52; *The Belgic*, 2 P. D. 57; *The Rhosina*, 10 P. D. 24, 131.

³ *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; 11 H. L. Cas. 686; 12 Jur., N. S. 571; *Gibson v. Inglis*, 4 Camp. 72; 15 R. R. 727.

of ships in actions for damages caused to them by negligently managing harbours, or berthing or towing operations, under their control.¹

The Apollo.

Thus, in *The Apollo v. Port Talbot Company*,² the House of Lords have held, reversing the decision of the Court of Appeal (Lords Bramwell and Morris dissenting), that a dock company regulated by statute which empowered the owners to take tolls for ships entering the docks, and required persons in command of vessels to place them as the harbour-master should direct, were liable under the following circumstances:—

A ship entered a dock to load. While crossing the dock her propeller got foul of a rope so that the shaft was jammed and the engines could not be worked. There being no dry dock the ship was, with the assent of the harbour-master, put into a lock which served as the entrance to the dock, in order that the water might be drawn off and the propeller cleared; the harbour-master representing to the captain of the ship that the bottom of the lock was level and that the ship might safely ground there. When the ship took the ground, being then heavily laden, she sustained serious injury owing to the existence of a sill which projected several inches above the level of the bottom across the middle of the lock.³

Lords Bramwell and Morris were of opinion that the harbour-master had authority to permit the ship to use the lock for the purpose for which she used it, but that he had no authority to undertake that the lock was safe or to undertake any duty of care; nor did he, in fact, so undertake; that the captain took the ship into the lock, not of right, but only under a licence and at his own risk, the use of the lock being for an abnormal and extraordinary purpose; and that the dock owners were not liable.

The Rhosina.

So, in *The Rhosina or Edwards v. Falmouth Harbour Commissioners*,⁴ a harbour-master went on board a vessel which he had directed to be beached within the jurisdiction of the Falmouth Harbour Commissioners. While on board, and while the vessel was passing through a part of the harbour which was within the

¹ *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; 11 H. L. Cas. 686; see also *The Burlington*, 72 L. T. 890; 8 Asp., M. C. 38; *Williams v. Swansea Harbour Trustees*, 14 C. B., N. S. 845; *Metcalfe v. Hatherington*, 11 Ex. 257; 5 H. & N. 719.

² (1891) A. C. 499; 66 L. J., Adm. 25; 65 L. T. 590.

³ See *The Burlington*, 72 L. T. 890;

8 Asp., M. C. 36, C. A. (1895). See also *Williams v. Swansea Harbour Trustees*, 14 C. B., N. S. 845; *Wilson v. Newport Dock Co.*, L. R., 1 Ex. 177; 53 L. J., Ex. 97; 14 L. T. 230.

⁴ 54 L. J., Adm. 72; 10 P. D. 131; 53 L. T. 30; 33 W. R. 794; 5 Asp., M. C. 460, C. A.

limits of the property of the Falmouth Dock Company, the harbour-master gave certain orders, the result of which was that the ship was damaged by her anchors. The Court of Appeal held (affirming the judgment of Sir James Hannen¹), that the harbour-master was acting as harbour-master; that he was giving directions within 10 Vict. c. 27, s. 52, for regulating the manner in which the vessel should enter into or lie in or at the harbour; that the manœuvre was an unskilful one; and that the harbour commissioners were liable for the damage.

In *Thompson v. North-Eastern Railway Company*,² where part of a dock basin was obstructed by a temporary bank and the ship was in charge of a river pilot, it was held by the Exchequer Chamber, affirming the Queen's Bench:

*Thompson v.
N. E. Ry. Co.*

(1) That it was the duty of the defendants to take reasonable care to make their dock and basin safe for navigation before they opened them to the public; and, therefore, they were liable for negligence in opening them before the channel had been well cleared.

(2) That, assuming the knowledge of the state of the basin by the pilot to be the knowledge of the plaintiffs, it was no excuse for the defendants, inasmuch as they contended that the state of the basin was not such as to make it imprudent to take the vessel out; and the jury had negatived mismanagement on the part of those who had charge of the vessel.

In *The Ratata*,³ the appellants (the Mayor and Corporation of Preston), who are a port and harbour authority, undertook for payment to tow the respondents' vessel, with others, by hired tugs up a tidal river, to lighten the respondents' vessel if necessary, and to conduct the whole operation of the towage upon a certain tide, including the arrangement of the time and order of procession, the river being too narrow for two vessels to go abreast or pass one another. The tug towing the leading vessel was so slow and inefficient that the respondents' vessel, which was last in the line, was stranded on the ebb-tide and damaged.

The Ratata.

The House of Lords held, affirming the Court of Appeal, that the appellants were bound to exercise reasonable care and skill in the conduct of the towage, and that, there being evidence of failure in that respect, the respondents were entitled to sue the appellants for damages.

¹ 54 L. J., Adm. 42.

² 2 B. & S. 106; 31 L. J., Q. B. 194;
61 L. T. 127.

³ (1898) A. C. 513; 67 L. J. 73; 78 L. T. 797; 47 W. R. 156; 8 Asp., M. C. 427, H. L. (E.).

In *Smith v. London and St. Katherine Docks Company*,¹ the plaintiff, on the invitation of an officer of a vessel lying in docks of which the defendants were proprietors, went on board such vessel on business connected therewith, and on his return back stepped on a gangway which formed the communication between the vessel and the shore, when it tilted over and threw him into the water. The gangway was the means of access to the vessel which the defendants had provided for that purpose; it was their property, and, at the time of the accident, was about to be re-arranged by their servants to make it secure, it having been rendered unsafe by reason of their having just previously shifted the position of a vessel on which it rested. The defendants' servants were aware of the gangway being dangerous, but the plaintiff was not.

Held, that there was a duty on the part of the defendants to the plaintiff to have made the gangway safe, or to have given him notice of the danger; and that, for the breach of such duty, the plaintiff had a right of action against the defendants.

In the case of *Coe v. Wise*,² it was held, that commissioners, authorized by Act of Parliament to make and maintain a sluice, which burst owing to the negligence of their servants, were not exempt from liability, by reason of their being commissioners for public purposes; and the duty being imposed on them to maintain the sluice, they were liable for damage caused by negligent performance of that duty of their servants.

Liability to
repair.

When the Bristol Dock Company were authorized to make a new course for the river Avon, of equal depth and breadth at the bottom, and of equal inclination at the sides as the old course, it was held, that a duty was thereby cast on them generally to repair the banks of the new channel, and that a mandamus would lie to compel them, though they might also be liable to indictment. A return, that they were not liable to repair, and that, as near as circumstances permitted, they had maintained the new channel of equal depth, breadth, and inclination, was, therefore, held not sufficient.³

The same company, being authorized as above, were also required by their Act to compensate persons interested in lands injured. They purchased certain lands and closes, and sold parts

¹ 37 L. J., C. P. 326; 18 L. T. 403; 16 W. R. 728.

² L. R., 1 Q. B. 711; 37 L. J., Q. B. 262; 14 L. T. 891. following *Mersey*

Docks v. Gibb, L. R., 1 H. L. 93; 35 L. J. 225; 14 L. T. 677.

³ *Reg. v. Bristol Dock Co.*, 2 Railw. Cas. 599.

in lots—a strip of land being left for a public road between the new channel and the lots. A portion of the road was washed away, and the owners of houses built on the said lots applied to the company to repair the bank, but they refused. On application by the corporation of Bristol, who were conservators of the river, and on affidavit stating these facts, and also stating apprehension of injury to the navigation, though no actual injury, it was held that a mandamus should issue to compel the defendants to repair.¹

Their Act of Parliament directed the Bristol Dock Company to make a common sewer in a certain direction, &c., and to alter other sewers, so as to discharge considerably below the surface of the water of their floating harbour, and to make such other alterations, &c., in the sewers as might be deemed necessary in consequence of the floating of the said harbour. The company altered certain sewers, so as to discharge them considerably under the surface, but the sewage became a nuisance. It was held that, under the latter part of the above clause, they were required to make a new sewer, if necessary, to remove the nuisance, the mode of remedying the evil being left to their discretion by the Act.²

Dock companies, acting strictly in accordance with the terms of their statutes, will not be held liable to make compensation, even where such lawful acts prove indirectly injurious to the rights of others.³

The London Dock Company were empowered to make a new entrance to their dock, and to take down houses, &c. Every person having an estate or interest, not less than a tenancy from year to year, who should be injured in his said estate or interest by the making of any cut, sluice, bridge, road, or other work, was to be compensated. The company pulled down certain houses and made a cut which intercepted several thoroughfares, and the tenants of a neighbouring public-house demanded compensation for the loss of custom—not for loss of value as a private house. It was held that they were not entitled to such compensation, Lord Denman, C. J., saying, “It is the necessary consequence ‘of the lawful act done by the company.’”⁴

¹ *Reg. v. Bristol Dock Co.*, 11 Railw. Cas. 542.

² *Reg. v. Bristol Dock Co.*, 6 B. & C. 181; 30 R. R. 280; as to repair of piers of an ancient ferry by river navigation trustees, see *Clyde Navigation Trustees*

v. Lord Blantyre, (1893) App. Cas. 703, H. L. (Sc.).

³ As to liabilities of Companies generally see *ante*, pp. 268 *et seq.*

⁴ *Reg. v. London Dock Co.*, 5 A. & E. 163; 44 R. R. 387.

By a section of a statute empowering commissioners to maintain a sluice, any person who, after the commissioners or any person authorized by them had begun to carry the statute into execution, should sustain any injury thereby, was to be compensated, and the damage or injury was to be ascertained by a jury before the sheriff. The sluice having burst and injured the property of the plaintiff, it was held, that the section only applied to damage resulting from acts authorized by the statute; but, if not, yet as the cause of action was for an omission or non-feasance, it was not within the subject of compensation.¹

¹ *Coe v. Wise*, L. R., 1 Q. B. 711; 37 L. J., Q. B. 262; 14 L. T. 891; see as to compensation *ante*, p. 287.

CHAPTER VI.

OF FISHERY.

The various Rights of Fishery.

THE right of fishing is a right which may exist either in connection with or independent of the ownership of the soil over which water flows. When this right is connected with the ownership of the soil, it is a right of property, one of the profits of the land, and has been called a *territorial fishery*.¹ When it is independent of the ownership of the soil, it is either a common right—like the public right of fishery in the sea and tidal waters—or it is a profit or easement over the soil of another, founded on grant or prescription from the owner of the soil, or from the Crown as owner of the bed of tidal waters.

Definition of
right of
fishing.

When unconnected with the ownership of the soil, a right of fishery is an estate of inheritance, which will pass by a grant of all other estates of inheritance,² an incorporeal hereditament, which can only be granted by a deed,³ and which cannot be the subject of an exception in a deed,⁴ or be “abandoned.”⁵

In alieno solo.

It is, moreover, not, strictly speaking, an easement, but a *profit à prendre* in the soil of another, and cannot be claimed by prescription by the public,⁶ or by a large and indefinite class such as “owners and occupiers.”⁷

In *Goodman v. Saltash Corporation*,⁸ a prescriptive right to a several oyster fishery in a navigable tidal river was proved to have been exercised from time immemorial by a borough

¹ See Woolrych on Waters, p. 110; Schultes' Aquatic Rights, p. 87; Angell on Watercourses, p. 80; *Eckroyd v. Coultard*, (1898) 2 Ch. 248; 67 L. J., Ch. 458; 78 L. T. 702; *Devonshire v. O'Connor*, 24 Q. B. D. 468; 59 L. J., Q. B. 206; *Bennett v. Coster*, 8 Taunt. 183; 2 Moore, 83; 19 R. R. 491.

² *Cooper v. Phibbs*, L. R., 2 H. L. 150.

³ *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 29 R. R. 449; *Bird v. Higgen-*

son, 2 A. & E. 696.

⁴ *Corker v. Payne*, 18 W. R. 436; *Wickham v. Hawker*, 7 M. & W. 63.

⁵ *Neill v. Devonshire (Duke of)*, 8 App. Cas. 135.

⁶ *Ibid.*

⁷ *Tilbury v. Silva*, 45 Ch. D. 98; 62 L. T. 254. See *Goodman v. Mayor of Saltash*, 7 App. Cas. 633; *A.-G. v. Jones*, 6 C. B. 81; 17 L. J., C. P. 206; *post*, p. 367.

⁸ 7 App. Cas. 633.

corporation and its lessees, without any qualification except that the free inhabitants of ancient tenements in the borough had from time immemorial without interruption, and claiming as of right, exercised the privilege of dredging for oysters in the *locus in quo* from the 2nd February to Easter Eve in each year, and of catching and carrying away the same without stint for sale and otherwise. This usage of the inhabitants tended to the destruction of the fishery, and if continued would destroy it. The House of Lords¹ held (Lord Blackburn dissenting), that the claim of the inhabitants was not to a *profit à prendre* in *alieno solo*; that a lawful origin for the usage ought to be presumed if reasonably possible, and that the presumption which ought to be drawn, as reasonable in law and probable in fact, was that the original grant to the corporation was subject to a trust or condition in favour of the free inhabitants of ancient tenements in the borough in accordance with the usage.

Kay, J., remarks on this decision of the House of Lords in the case of *Tilbury v. Silva*² as follows:—"There is another equally difficult point for the plaintiff to get over, which is this—that he comes here claiming this right, not merely on behalf of himself, but on behalf of himself as a member of a class which he describes as 'owners and occupiers of ancient copyhold tenements, and of ancient tenements, formerly copyhold but now enfranchised, of the manor of Chilbolton.' 'Owners and occupiers' constitute a very large and indefinite class, and ever since *Gateward's case*³ it has been held that you cannot claim by prescription a right like this—which is a *profit à prendre*—on behalf of a large and indefinite class of that kind. Such a claim cannot be maintained by prescription. Of course reference has been made to the exception introduced by the case of *Goodman v. Mayor of Saltash*.⁴ That was a case in which certain persons claimed against a corporation a right of dredging for oysters, and there, the usage having been shown to have existed as of right and without interruption in such a manner as would justify a claim by prescription, the Court felt themselves bound to refer that usage to some legal origin, and invented a most ingenious legal

¹ Lords Selborne, Cairns, Watson, Bramwell and Fitzgerald.

² 46 Ch. D. 98, at p. 107; 62 L. T. 254.

³ 6 Rep. 59 b.

⁴ 7 App. Cas. 633.

"origin by supposing a grant to the corporation in trust for certain persons, the free inhabitants of ancient tenements within the borough. In that way they got over the difficulty which *Gateward's case* had introduced, namely, that such a right could not be claimed by prescription. But here I have nothing of the kind. There is no possibility of inventing such a mode of escaping from the difficulty in this case as was invented in the case of *Goodman v. Mayor of Saltash*. Here there is no corporation who could be trustee for this indefinite class of the right claimed. Therefore the case does not seem to me to come within the exception which that authority has introduced. It seems to me that, for either of these reasons, a claim simply by prescription cannot possibly be maintained in this case."¹

As such *profit à prendre*, a fishery may exist either in *gross*, or as appurtenant to a manor,² and, in some cases, as appurtenant to a house or to land.³ A right of fishery in gross is not within the Prescription Act (2 & 3 Will. IV. c. 71),⁴ and would appear not to be a sufficient interest in land to give a claim to compensation under the Lands Clauses Consolidation Act.⁵

Much difficulty arises, especially in the interpretation of old cases, from the confusion of the terms used to express the various kinds of fishery recognized by the law, and from sufficient attention not having been paid to the fact that nearly all the kinds of fishery may exist either in the owner of the soil, or in a stranger,—in which two cases the law, as to trespass particularly, will materially differ.⁶ It will be the most convenient course here to attempt, in the first place, to define and explain the various kinds of fishery and their incidents, and then to proceed to consider how and where such rights of fishery may be enjoyed. Finally, we shall enumerate and discuss the various statutory regulations of and restrictions on the rights of fishery, with regard to the kinds of fish which may be caught, and the

The various kinds of fishery.

¹ The Court of Appeal (Cotton, L. J., Bowen, L. J., and Fry, L. J.) were unanimous in affirming Kay, J.'s judgment.

² *Rogers v. Allen*, 1 Camp. 305; 10 R. R. 689; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 702. per Willes, J.; *Wickham v. Hawker*, 7 M. & W. 63.

³ *Hayes v. Bridges*, 1 R., L. & S. 390; see *Edgar v. Fishery Commissioners*, 23 L. T., N. S. 732.

⁴ *Shuttleworth v. Le Fleming*, *supra*; *Bland v. Lipscombe*, 4 E. & B. 713; *Neill v. Devonshire*, 8 App. Cas. 135.

⁵ *Bird v. Great Eastern Rail. Co.*, 19 C. B., N. S. 268.

⁶ See Paterson's *Fishery Laws*, p. 4, and per Fitzgerald, B., in *Bloomfield v. Johnson*, Ir. R., 8 C. L. 107; *Acheson v. Henry*, Ir. R., 7 C. L. 486; *Acheson's Estate*, Ir. R., 3 Eq. 103.

means which may be used to catch them, and the seasons during which they may be caught.

The kinds of fishery mentioned in our books are, according to the best authorities, four in number,¹—viz. (1) A common fishery; (2) A several fishery; (3) A free fishery; (4) A common of fishery. A fishery *in gross* is also sometimes mentioned; but such a fishery is merely any of the last three kinds when enjoyed apart from the ownership of the soil over which the water flows. We shall make use of the words *territorial fishery* to define that kind of several and exclusive fishery arising from and connected with the ownership of the soil in non-tidal waters.

Common
fishery.

A common fishery is that kind of right which all the public have to fish in the sea and in tidal navigable rivers, as far as the flux and reflux of the tide. This right cannot exist in non-tidal waters, whether they be navigable or not.²

Several
fishery.

A several fishery is a right of fishing in a particular place exclusive of all others.³ This right may exist, as will be seen hereafter, in tidal waters as a royal franchise to the exclusion of the public—in which case it is sometimes called a free fishery. The word “several” or “*separalis*” *piscaria* is not necessary to create a several fishery.⁴ It exists *primâ facie* in the owner of the soil of non-tidal waters—in which case it may be called a territorial fishery. Finally, it may be enjoyed in non-tidal waters by a stranger by grant or prescription to the exclusion of the owner of the soil. The owner of a several fishery, whether owner of the soil or not, can maintain trespass for breaking his several fishery and taking his fish,⁵ and has a privileged property in the fish before they are caught.⁶

A several fishery or exclusive right to take all the fish at a certain place, when not a territorial right, would appear to be always claimed in gross, or as appurtenant to a manor,⁷ as

¹ See Paterson's Fishery Laws, pp. 4, 45; Woolrych on Waters, p. 75; Hough on Navigable Rivers, p. 138.

² *Pearce v. Scotcher*, 9 Q. B. D. 162; *Smith v. Andrews*, (1891) 2 Ch. 675; *Musset v. Burch*, 35 L. T., N. S. 486; *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68; see also *A.-G. v. Emerson*, (1891) App. Cas. 649; *Hindson v. Ashby*, (1896) 2 Ch. 1.

³ *Malcolmson v. O'Dea*, 10 H. L. 593; 9 L. T. 93, per Willes, J.; *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68; *Holford v.*

Bailey, 13 Q. B. 426; *Seymour v. Courtenay*, 5 Burr. 2815; Co. Litt. 122 a; Hale de Jure Maris, p. 1; *Gipps v. Woollicot*, Skin. 677; *Smith v. Kemp*, 2 Salk. 637; *Kinnerley v. Orpe*, 1 Doug. 56.

⁴ *Hanbury v. Jenkins*, (1901) 2 Ch. 401.

⁵ *Holford v. Bailey*, 13 Q. B. 426; 18 L. J., Q. B. 109.

⁶ *Child v. Greenhill*, Cro. Car. 553.

⁷ *Rogers v. Allen*, 1 Camp. 311; 10 R. R. 689.

such a right is too exclusive to be claimed as appurtenant to land.¹

A free fishery, also sometimes called a common of fishery, is a fishery in a certain place, not exclusive, but co-extensive with the rights of others.² It may exist in tidal waters, to the exclusion of the public; in which case it resembles a several fishery, except that it is enjoyed by two or more persons. It may exist in the owner of the soil of non-tidal waters in conjunction with others, or it may exist in two or more strangers, to the exclusion of the owner of the soil.³ The main distinction between a several and a free fishery is, that the one is exclusive, and the other is not;⁴ and that, in non-tidal waters, a several fishery implies a right to the soil, while a free fishery does not.⁵ Formerly also, when different forms of action could not be joined, there was an important distinction between the owners of a several, and of a free fishery; for the owner of a several fishery could maintain an action of trespass for the breaking of his fishery, and taking his fish, whether he was owner of the soil or not; whereas the owner of a free fishery, unless also owner of the soil, could not maintain trespass, but had only a right of action on the case for disturbance.⁶ The owner of a free fishery has not, it appears, such a property in the fish before they are caught, as to enable him to maintain trespass for taking fish, such fish not being property till they are caught.⁷ A free fishery may be claimed in gross or as appurtenant to land.⁸

The term "free fishery," however, is frequently used to express a several fishery in a public river; and much confusion has arisen from the ambiguous use of the term. Willes, J., remarks in a case, already cited,⁹ "Some discussion took place

¹ *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 732.

² *Seymour v. Courtenay*, 5 Burr. 2814; *Malcolmson v. O'Dea*, 10 H. L. 593; 9 L. T. 93; *Holford v. Bailey*, 13 Q. B. 445; *Gipps v. Woollicot*, 3 Salk. 291; Co. Litt. 122 a.

³ See Paterson's Fishery Laws, p. 53.

⁴ In *Bloomfield v. Johnson* it was held, that the grant of a free fishery, especially by the Crown, is the grant of a fishery not exclusive, and evidence cannot be received to show that it was intended to exclude the grantee.

⁵ *Holford v. Bailey*, 13 Q. B. 426; 18 L. J., Q. B. 109; *Marshall v. U'les-*

water, 3 B. & S. 732; 41 L. J., Q. B. 41; 25 L. T. 793; see also *Bloomfield v. Johnson*, Ir. R., 8 C. L. 105; *A.-G. v. Emerson*, (1891) App. Cas. 649.

⁶ *Bloomfield v. Johnson*, per Fitzgerald, B., Ir. R., 8 C. L. 68; *Holford v. Bailey*, 13 Q. B. 426; *Gipps v. Woollicot*, Skin. 677, per Holt, C. J.; *Upton v. Dawkins*, 3 Mod. 97.

⁷ *Bloomfield v. Johnson*, *supra*.

⁸ See per Willes, J., in *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 732; *Rogers v. Allen*, 1 Camp. 311; 10 R. R. 689; *Hayes v. Bridges*, 1 R., L. & S. 390.

⁹ *Malcolmson v. O'Dea*, 10 H. L. 593.

"during the argument as to the proper name of such a fishery, "whether it ought not to have been called in the pleadings, "following Blackstone, a 'free,' instead of a 'several' fishery. "This is more of the confusion which the ambiguous use of the "word 'free' has occasioned, from as early as the *Year Book*, "7 *Hen. VII.*, 13, down to the case of *Holford v. Bailey*,¹ where "it was clearly shown that the only substantial distinction is "between an exclusive right of fishery, usually called 'several,' "sometimes 'free' (used as in free warren), and a right in "common with others, usually called 'common of fishery,' "sometimes 'free' (used as in free port). The fishery in this "case is sufficiently described as a several fishery, which means "an exclusive right to fish in a given place, either with or "without the property in the soil."

Effect of
grant of a
fishery.

Where the owner of a several fishery grants a free fishery, the grantee takes a free fishery; but where he grants his fishery without specifying what kind of fishery, the whole fishery will pass.²

An exclusive fishery, it seems, may be divided, without losing its proper character; for where a grantor granted a several fishery, with the exception of an oystery, and reserving to himself to take fish for the supply of his own table, it was held that this was the grant of a several fishery; for, said the Court, "In order "to constitute a several fishery, it is requisite that the party "claiming it should have the right of fishing, independent of all "others, as that no person should have a co-extensive right "with him in the subject claimed; for where a person has a "co-extensive right, there is only a free fishery. But we think "that a partial independent right in another, or a limited liberty, "does not derogate from the right of the several owner."³

Common of
fishery.

A common of fishery appears to be much the same as a free fishery—i.e., a right not exclusive to fish in a particular place, and is often used in this sense, but it is generally used to express the right acquired by tenants of a manor to fish in the waters of the lord. This right is on the same footing as other commons, and depends much in each case on the custom of the manor. It

¹ 13 Q. B. 426.

² *Alderman of London v. Hastings*, 2 Sid. 8; *Paget v. Milles*, 3 Dougl. 43.

³ *Seymour v. Courtenay*, 5 Burr. 2815; see also *Holford v. Pritchard*, 8 Ex. 793; *Bird v. Higginson*, 2 A. & E. 696, as to the right of letting part of a

fishery; see also 1 Mod. 106; see as to effect of barony grants of fishing under the law of Scotland, *Lord Advocate v. Sinclair*, L. R., 1 H. L. Sc. 176; *Lord Advocate v. Lorat*, 5 App. Cas. 273; *McDonall v. Lord Advocate*, L. R., 2 H. L. Sc. 401.

is generally appendant or appurtenant to the copyhold tenements of the manor, but in some cases is held in gross.¹

"A common of fishery," says Paterson,² "is of three kinds—common appendant, common appurtenant, and common in gross. A common appendant is a right inseparably annexed to the possession of a particular house, and the extent of the right is measured by the reasonable requirements of the family. It is a right of a permanent nature attached to a house, and is not available to mere inhabitants or lodgers, but is restricted to him who has an estate or interest in the house.³ Hence it is that the inhabitants of a vill or city cannot prescribe for such a right, as there would be an uncertain measure of claimants.⁴ A common of piscary appurtenant is a right claimed by a person in respect of a house not necessarily connected by way of tenure or otherwise with the liberty of the fishery; the right must have been granted by deed within the time of legal memory.⁵ It may also be severed from the house and land to which it is appurtenant.⁶ Common in gross is a right claimed by a person not in respect of any land, but under a grant, or, what is equivalent, by prescriptive user." A common of fishery is not correctly described by alleging it to be a common fishery.⁷

A right of fishery apart from the ownership of the soil, being an incorporeal hereditament, can only be conveyed by deed.⁸ A licence to fish is distinct from a right of fishery, and is revocable at will. A licence (*in order to be binding on the grantor*), even for an hour, must be granted by deed.⁹ But the fishery may be let by verbal agreement, and even where no rent has been agreed upon, the landlord is entitled to sue the tenant for a reasonable rent for use and occupation.¹⁰

A grant by deed to the plaintiffs for a term of years of "the exclusive right of fishing" in a defined part of a river, with a proviso that "the right of fishing hereby granted shall only extend to fair rod and line angling, and to netting for the sole

¹ Paterson's Fishery Laws, p. 55; Woolrych, p. 127; 4 Edw. IV. 29.

² Fishery Laws, p. 56.

³ *Gateward's case*, 6 Rep. 59 b; Cro. Jac. 152.

⁴ *Ordway v. Orme*, 1 Bulst. 183; *Tinneg v. Fisher*, 2 Bulst. 87; *English v. Burnell*, 2 Wils. 258. See *ante*, pp. 337 *et seq.*

⁵ *Cowlam v. Slack*, 15 East, 107; 13 R. R. 401; *Pretty v. Butler*, 2 Sid. 87.

⁶ *Teniel v. Harslop*, 3 Keb. 66; *Hayes v. Bridges*, 1 R., L. & S. 890.

⁷ *Bennett v. Coster*, 3 Taunt. 183; 2 Moore, 85; 19 R. R. 491.

⁸ *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 29 R. R. 449; *Bird v. Higginson*, 2 A. & E. 696.

⁹ *Holford v. Bailey*, 13 Q. B. 426, per Parke, B.; *Hopkins v. Robinson*, 2 Lev. 2.

¹⁰ *Holford v. Pritchard*, 3 Ex. 793.

Licences to fish.

"purpose of procuring fish baits," has been held by the Court of Appeal not to give a mere licence to fish, but a right to fish and to carry away the fish caught; that this was a *profit à prendre*, and was an incorporeal hereditament; and that the plaintiffs had a right of action against anyone who wrongfully did any act by which the enjoyment of the rights given to them by the deed was prejudicially affected.¹

Having now defined the various kinds of fishery recognized by the law, we now propose to consider how and where such rights can be enjoyed.

Fishery in the Sea.

Fishery in the high seas is common to all the world.

On the high seas the right of fishing is common to all the world without any restriction or limitation whatever, either as to the description of fish that may be caught, or the means of catching them, except as provided in the conventions with certain foreign states, which are considered *post*, p. 379. When, however, disputes of a private character arise on the open sea between fishermen of different countries, the solution of these disputes is regulated by the custom of the locality where they occur. But such custom to be binding must be clearly understood by all those who frequent the locality in question.²

Fishery in the territorial waters of the realm.

The rights of fishery within the territorial waters of the realm within the distance of three nautical miles of low water mark would appear to be vested exclusively in the subjects of the realm by international law, evidenced by treaty or immemorial user, the subjects of one country not being entitled to fish within the territorial sea of another without a licence from the Crown or sovereign authority.³ Within the ports and harbours and in the sea within the body of a county, or *intra fauces terræ*, and between high and low water mark, the fishery is, by common law, common to all the subjects of the realm, subject to legal restrictions mentioned hereafter.

Convention with France.

By a convention entered into with the French government, which is embodied in the *Sea Fisheries Act*, 1868,⁴ it is provided

¹ *Fitzgerald v. Firbank*, (1897) 2 Ch. 96; 76 L. T. 584, C. A.

² *Aberdeen Arctic Co. v. Sutter*, 4 Macq. App. Cas. 355; *Fennings v. Lord Grenville*, 1 Taunt. 147; 9 R. R. 760; *Young v. Hitchens*, 6 Q. B. 606; D. & M. 592; and as to whale fishery under 28 Geo. III. c. 20, see *Lacon v. Cooper*, 1 Esp. 246; see also Paterson's Fishery

Laws, pp. 6, 7, and cases cited there; *Littledale v. Seaith*, 1 Taunt. 243 a; 9 R. R. 762; *Hogarth v. Jackson*, M. & M. 58; *Skinner v. Chapman*, M. & M. 59, n.

³ See Paterson's Fishery Laws, p. 6; Hale de Jure Maris, c. 4; Selden, Mare Clausum, bk. 11, c. 81; see also *Reg. v. Keyn*, 2 Ex. Div. 205; 46 L. J., M. C. 17.

⁴ 31 & 32 Vict. c. 45.

that British fishermen shall enjoy the exclusive right of fishery within three nautical miles from low water mark of the British coast, and that French fishermen shall enjoy the same privilege within three nautical miles of the French coast, except as to that portion of the French coast between Cape Carteret and Point Meinga. The distance of three miles with respect to bays, the mouths of which do not exceed ten miles in width, is to be measured from a straight line drawn from headland to headland. Various regulations and restrictions on the manner of taking, and the seasons for taking fish, are imposed by this and by conventions with other states, confirmed by statute, as to the fisheries outside the territorial waters.¹

The right of fishing in the sea being common to all subjects of the realm, a prescription for such a right annexed to a tenement is bad.²

Fishery in Tidal Waters.

The right of fishing in the sea between high and low water mark, in tidal waters, in estuaries and arms of the sea, and in public navigable rivers, so far as the tide ebbs and flows, is *prima facie* vested in all the subjects of the realm.³ It seems somewhat doubtful whether this right is to be considered as belonging to the public of common right, or whether they derive it from the Crown as owner of the bed and soil of tidal waters;⁴ but, however acquired, this right is now absolute and cannot be barred or interfered with by grant or charter from the Crown.⁵ This public right includes the right of fishing on the shore between high and low water mark, and of taking shell-fish there, though it appears doubtful whether the public have a right to take fish shells.⁶ This right of using the shore, however, does not, in the absence of prescription, extend to the right of using the adjoining land for the purposes of fishery, either in the way of fixing nets by stakes, or drying nets, or drawing them ashore, or of drawing up or leaving boats for future use, or of loading and unloading fish or other goods at all times and not under peril and

The public right.

¹ See *post*, pp. 391, 396.

² *Ward v. Cresswell*, Willes, 265.

³ *Malcolmson v. O'Dea*, 10 H. L. 593; *Murphy v. Ryan*, Ir. R., 2 C. L. 143; *Bristowe v. Cormican*, 3 App. Cas. 641, per Lord Blackburn; *Wyse v. Leahy*, Ir. R., 9 C. L. 384; *Crichton v. Colley*, 19 W. R. 107; *Reg. v. Stimson*, 4 B. & S. 301; *Carter v. Murcott*, 4

Burr. 2163; *Fitzwalter's case*, 1 Mod. 106; Hale de Jure Maris, p. 1, c. 4.

⁴ As to this, see Woolrych on Waters, p. 76; and *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; 38 L. J., Ex. 226; 21 L. T. 133.

⁵ *Warren v. Mathews*, 6 Mod. 73.

⁶ *Blundell v. Catteral*, 5 B. & A. 299; 24 R. R. 353, per Holroyd, J.

necessity;¹ as such rights would be inconsistent with the nature of permanent private property, such rights may, however, it seems, be gained by custom by the fishermen of a particular locality.²

Thus where the oysters in a certain oyster fishery were when freshly dredged unfit for consumption by reason of their being contaminated with certain impurities in the water in which the oyster beds were situate, and the fishermen, in order to render the oysters marketable, had been used from time immemorial to deposit them for a time after dredging, upon the foreshore in another part of the fishery where the water was pure, it was held, that this practice might be justified as against the owners of the soil of the foreshore as being incidental to the enjoyment of the public right of oyster fishing both by custom and by the common law.³

Interference
with, indict-
able;

It would appear that, by common law, the public have the right of catching in the sea and public rivers all the fish they can by all means which are not inconsistent with the rights of others, but that any undue interference with the rights of others is a nuisance and indictable.⁴ The right of public fishery, however, includes the right to use lawful nets.⁵

and action-
able on proof
of special
damage.

It has been held by the Irish Court of Exchequer, that an infringement of the public right of fishery is actionable on proof of special damage, and that a member of the public who was licensed to fish in the upper waters of a tidal river could maintain an action against a person who by unlawfully fishing in the lower waters of the river, within certain limits prohibited by statute, caused damage to the plaintiff in the exercise of his right to fish.⁶

Royal fish.

The public have no right to take royal fish,—i.e. whale, sturgeon, or porpoise, which, whether caught in the sea or thrown on the shore within the realm, are the property of the Crown and not of the finder.⁷

Public right
confined to
tidal waters.

The public common fishery is, it would appear, confined to the sea and tidal waters, and cannot exist at law in non-tidal

¹ *Ilchester v. Rushleigh*, 5 T. L. R. 739; 61 L. T. 477; as to mooring of fishing boats as an incident of navigation, see *A.-G. v. Wright*, (1897) 2 Q. B. 318, *post*, p. 433.

² Year Book, 13 Hen. VIII. 15, 6; 8 Edw. IV. 19, pl. 30; Hale de Port. Maris, p. 86; Year Book, 15 Edw. IV. f. 29 A, pl. 7; *Padwick v. Knight*, 7 Ex. 861; *Blundell v. Catteral*, 5 B. & Ald. 291; 24 R. R. 353; see also *Aiton v. Stephens*, 1 App. Cas. 456, H. L. Sc.

³ *Truro Corporation v. Rowe*, (1901) 2 K. B. 870.

⁴ As to this, see Paterson, p. 33; *Leconfield v. Lonsdale*, L. R., 5 C. P. 664; *Hamilton v. Donegal*, 3 Ridg. P. C. 267; see also *Young v. Hitchens*, 6 Q. B. 606.

⁵ *Warren v. Matthews*, 6 Mod. 73.

⁶ *Whelan v. Hewson*, Ir. R., 6 C. L. 283.

⁷ See Hall on the Seashore, p. 80; Paterson's Fishery Laws, pp. 24, 265, and *ante*, Chap. I. p. 46.

waters, although navigable and navigated from time immemorial, for the purposes of commerce, the right to navigate giving no right to fish. Moreover, no prescriptive right can be acquired by the public by user beyond living memory.¹

It has been held by the Court of Queen's Bench, that where a non-tidal river was made navigable by an Act of Parliament which did not expressly interfere with the rights of the riparian owners, none of the incidents attaching to a navigable river up to the flow and reflow of the tide can properly attach, and that, therefore, a claim on the part of the public to fish there is a claim to a right which cannot exist at law.²

Following this, the Court of Exchequer has held, that such a right cannot exist at law in a non-tidal river which had been made navigable by locks, although evidence was given of user by the public of the right of fishing for more than forty years.³

From these cases it is clear that where a non-navigable river has been made navigable by artificial means, the public right of fishery cannot exist.

The question, however, as to the right of the public to fish in non-tidal waters which have been navigable and navigated from time immemorial, is one on which much difference of opinion has prevailed. In the Irish Court of Common Pleas,⁴ this question arose as to the right of fishing in the river Barrow, which was proved to be in the place in question, a non-tidal navigable river which had been navigated from time immemorial, and in which there had been an immemorial usage of fishing by the public. The Court held, that as the right of the public to fish in the sea and its arms and estuaries, and in tidal waters, depends on the ownership of the soil by the sovereign as trustee for the public, such a right could not be claimed by the public in non-tidal waters where the soil belongs *primâ facie* to the riparian owners *usque ad medium filum aquæ*, and not to the Crown; and that, moreover, such a right could not be established by immemorial user being a claim to a *profit à prendre* in the soil of another, which might involve the destruction of his property.⁵ "Upon full consideration of the cases," says O'Hagan, J., "it will, I

¹ *Murphy v. Ryan*, Ir. R., 2 C. L. 143 ;
Pearce v. Scotcher, 9 Q. B. D. 162 ;
Smith v. Andrews, (1891) 2 Ch. 678 ;
Neill v. Deronshire, 8 App. Cas. 135.

² *Hargreaves v. Diddams*, L. R., 10 Q. B. 582 ; 44 L. J., M. C. 78 ; 32 L. T. 600.

³ *Musset v. Burch*, 35 L. T., N. S. 486 ;

see also *O'Neil v. McEluine*, 16 Ir. Ch. R. 280.

⁴ *Murphy v. Ryan*, Ir. R., 2 C. L. 143.

⁵ See *Hudson v. McRae*, 4 B. & S. 585 ; *Race v. Ward*, 4 E. & B. 713 ;
Bland v. Lipscombe, 4 E. & B. 713,
note (c).

"think, appear, that no river has been ever held navigable, "so as to vest in the Crown its bed and soil, and in the public "the right of fishing, merely because it has been used as a "general highway for the purpose of navigation; and that "beyond the point to which the sea ebbs and flows even in "a river so used for public purposes, the soil is *primâ facie* "in the riparian owner, and the right of fishing private."

In the cases of *Pearce v. Scotcher*,¹ and *Smith v. Andrews*,² the Courts have fully adopted the law laid down in *Murphy v. Ryan*, and held that there can be no public right of fishery in non-tidal waters, even where an immemorial usage has been proved. So it has been held in *Reece v. Miller*³ that in the part of a navigable river where the water was not salt and in ordinary tides unaffected by any tidal influence, though upon the occasion of very high tides the rising of the salt water in the lower part of the river dammed back the fresh water, and caused it upon those occasions to rise and fall with the flow and ebb of the tide, no public right of fishing could exist.

In the case of *Mayor of Carlisle v. Graham*, the English Court of Exchequer held, following *Murphy v. Ryan*, that as the public right of fishing in public navigable rivers arose from the ownership of the Crown of the bed of such rivers, where a public navigable river changed its bed and flowed over a channel in the soil of a subject, the public right of fishing was lost.⁴ In *Orr Ewing v. Colquhoun*, it is expressly decided, that the right of navigation on non-tidal waters confers no right of property on the public navigating.⁵

Inland lakes.

In the case of *Bloomfield v. Johnson*,⁶ the Irish Court of Exchequer Chamber affirmed, with some hesitation, a judgment of the Court of Common Pleas, which determined that there is no public right of fishery in large inland non-tidal navigable lakes. The same point was raised on demurrer in a subsequent Irish case,⁷ and the Court of Exchequer held themselves bound by the prior decision of the Exchequer Chamber in *Bloomfield v. Johnson*. No appeal was brought from this judgment on the demurrer; but on appeal to the Exchequer Chamber for a new trial on the ground of misdirection or other grounds, Whiteside, C. J.,

¹ 9 Q. B. D. 162.

² (1891) 2 Ch. 678.

³ 8 Q. B. D. 626; 51 L. J., M. C. 64; see also *Hindson v. Ashby*, (1896) 2 Ch. 1, per Lindley, L. J., at p. 9.

⁴ L. R., 4 Ex. 361; 38 L. J., Ex. 226;

21 L. T. 133.

⁵ 2 App. Cas. 839.

⁶ Ir. R., 8 C. L. 68. See also *post*, pp. 373 *et seq.*

⁷ *Bristowe v. Cormican*, Ir. R., 10 C. L. 398.

strongly expressed his dissent from the principle affirmed in the judgment of the Court of Common Pleas on the demurrer.¹ The case subsequently went to the House of Lords, but the point as to the right of the public to fish not being before the House, no decision was given on it, but their Lordships held unanimously, that the Crown has no *primâ facie* right to the soil or fishery of non-tidal waters, though they were doubtful whether the rule, that the riparian owners on non-tidal waters are *primâ facie* entitled to the soil *ad medium filum aquæ*, applied to large inland lakes.²

In *Blower v. Ellis*,³ and *Micklethwaite v. Vincent*,⁴ claims by members of the public to fish in the Norfolk Broads, where the water was proved not to be tidal, were held not to be founded on law.⁵

If, therefore, it be law that the public right of fishing is a right arising from the ownership by the Crown of the bed over which the water flows, it seems to follow from necessity, that in rivers above the flux and reflux of the tide, in which the ownership of the soil is undoubtedly in the riparian owners, and in large navigable non-tidal lakes where it is undoubtedly not in the Crown, such a right cannot exist. It being, however, undecided to whom the bed of such lakes belongs, another element of difficulty enters into the subject with regard to them. In the case of *Reg. v. Burrow*,⁶ which was an appeal from a conviction by justices of a defendant who set up a *bonâ fide* claim of right as one of the public to fish in Ulleswater, Cockburn, C. J., seems rather to doubt the principles of law as stated in *Murphy v. Ryan*. "If," he says, "it had been clearly settled that the public could not have any right to fish in a navigable river above the flow of the tide, it might be different; but I, for one, am not prepared to assent to that proposition without further argument; and though there is recent authority for the proposition, that case may be taken by appeal to a higher Court; and in my opinion, it is a point of so much importance, that it should be taken, if necessary, to the very highest Court in the realm; such being the state of the question involved, and seeing that the defendant gave the very highest proof of *bona fides*, I think the justices ought to have held their hands; and I must say, it is the strongest instance of such a course being necessary that I have met with in my experience."

¹ Ir. R., 10 C. L. 434.

² 3 App. Cas. 641. See also *ante*, Chap. II. pp. 105 *et seq.*

³ 50 J. P. 328 (1886).

⁴ 67 L. T. 228 (1892).

⁵ See also *Horne v. Mackenzie*, 6 Cl. & F. 628.

⁶ 34 Justice of Peace, p. 53.

Several
fishery in
tidal waters.

How claimed.

By grant.

By prescrip-
tion.

Although *primâ facie* every subject is entitled to fish in the sea and tidal waters, yet prior to Magna Charta, the Crown could by its prerogative exclude the public from such *primâ facie* right, and grant the exclusive right of fishery to a private individual, either together with or distinct from the soil. The Great Charter restrained this exercise of prerogative for the future, but left untouched all fisheries which were made several to the exclusion of the public by act of the Crown not later than reign of Henry II.¹ Where, therefore, an individual claims a several fishery in the sea or tidal waters, he must prove his right to it, either by express grant from the Crown prior to Magna Charta, or by prescription from which such right will be presumed. In all cases the presumption is against the claimant, and he must establish affirmatively his exclusive right.²

Where he can prove an express grant or charter from the Crown, his right is without question.³ Where the claim is by prescription, the effect of the evidence in such cases is thus explained by Willes, J. "If evidence be given of long enjoyment of a fishery, to the exclusion of others, of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and that there is nothing to show that its origin was modern, the result is, not that you say, this is usurpation, for it is not traced back to Henry II., but that you presume that the fishery, being reasonably shown to have been dealt with as property, must have become such in due course of law, and, therefore, must have been created before legal memory."⁴ In the case cited, the plaintiff brought an action for breaking and entering his several fishery on the Shannon; and defendant set up as a defence that the river was a navigable river, and that the public had a right to fish there. The plaintiff put in evidence a patent of Queen Elizabeth, purporting to grant the several fishery in question, and defendant contended that the sovereign had no power by patent or otherwise to create a several fishery in a navigable river. It was held by the Irish Exchequer Chamber, that the grant by Elizabeth, and the user

¹ *Malcolmsen v. O'Dea*, 10 H. L. 593; 9 L. T. 93; *Crichton v. Colley*, 19 W. R. 107, Ir. Ex.; *Carter v. Murecott*, 4 Burr. 2163; *Fitzwalter's case*, 1 Mod. 106; see also *Duke of Northumberland v. Houghton*, L. R., 5 Ex. 127; 39 L. J., Ex. 66; 22 L. T. 491.

² *Crichton v. Colley*, 19 W. R. 107, Ir. Ex.; *Carter v. Murecott*, 4 Burr. 2163,

per Lord Mansfield; *Reg. v. Stimson*, 4 B. & S. 301; Hale de Jure Maris, p. 1, c. 4.

³ Hale de Jure Maris, p. 1, c. 5.

⁴ *Malcolmsen v. O'Dea*, 10 H. L. at p. 618; see also *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; cf. also *Lord Advocate v. Lorat*, 5 App. Cas. 273, per Lord O'Hagan, at pp. 288—289.

under it, was no evidence of a grant before Magna Charta, but the House of Lords reversed the judgment, and held that the fact of the Crown dealing with such a right in the days of Elizabeth was *primâ facie* evidence that the right had a legal origin, i.e., had been exercised before Magna Charta, and, that being the case, the several fishery could lawfully be afterwards made the subject of a grant by the Crown to a private individual.¹

But though the long exclusive enjoyment of a several fishery in a public navigable river is sufficient *primâ facie* evidence to establish the presumption that the Crown had granted a separate right before Magna Charta, yet any reasonable ground for considering that the user had not been exclusive, may be sufficient to negative such right.² This point arose on a case stated by the special commissioner of fisheries for the opinion of the Court of Common Pleas.³ The appellants claimed a right to a several fishery by means of a raise net on a marsh in the estuary of the tidal river Eden, and gave proof of user of it since 1797, though the right was contested by people in the neighbourhood. The fishery was claimed as part of the manor of Leonard Dacre, who was attainted in the reign of Elizabeth; on his attainder an inventory of his things were taken, and no mention was made of this particular net claimed; and the Court held that the omission of all mention of the right to a fishery of so peculiar a kind as to be accompanied by the right to use a fixed engine, was almost conclusive proof that the right did not exist at that time, and that, therefore, the presumption of a grant before Magna Charta was negatived. Willes, J., says at p. 736 of the Report, "I entirely adhere to what was said by the judges "in the *Shannon case* (*Malcolmson v. O'Dea*, 10 H. L. 593), that "long exclusive enjoyment of a right to a fishery in a public "navigable river, is sufficient evidence, and evidence upon "which, in the absence of any evidence to the contrary, it would "be right to arrive at the conclusion that the Crown had granted "a separate and exclusive right to the person under whom the "claim is made, as early as the reign of Hen. II., which is the "latest reign in which any such grant could be effected. You

¹ *Malcolmson v. O'Dea*, 10 H. L. 593; *Duke of Devonshire v. Hodnett*, 1 Huds. & Br. 332; see also *Ashworth v. Browne*, 19 Ir. Ch. R. 421; *Lord Advocate v. Sinclair*, L. R., 1 H. L. Sc. 176; *Neill v. Devonshire*, 8 App. Cas. 135; *Manuel v. Fisher*, 5 C. B., N. S. 856; *Zetland v.*

Glovers Incorporation, L. R., 2 H. L. 70.

² See *Tighe v. Sinnott*, (1897) 1 Ir. R. 140; *Little v. Wingfield*, 18 Ir. C. L. R. 279.

³ *Edgar v. Commissioners of Fisheries*, 23 L. T., N. S. 732.

"refer that long and peaceable enjoyment to a legal origin, "assuming that there was a continuance of such enjoyment from "the time when such legal origin could have existed and come "into existence, or given existence to a right. But in dealing "with a case of that description, you cannot apply the same "rules that you would to a case of a right which might be "created by a subject since the time of legal memory, because "you must shut out the presumption of a lost grant to the "subject since the time of legal memory. It will not do to prove "thirty years' enjoyment of such a right, commencing at the "beginning of the thirty years, or commencing at the beginning "of any other epoch later than the end of the reign of Hen. II. ; "and for this reason, because as soon as you show that the "origin was later than the time of Henry II., you negative the "inference of a usage from that period, which inference is the "foundation of the conclusion, that there was a grant as early "as the reign of Henry II."

In the case of *Holford v. George*,¹ where the owner of a several fishery in a navigable tidal river claimed a right to use certain engines which were made illegal by *The Salmon Fishery Act*, 1861, unless they had existed before *Magna Charta*; it was held that a user of them for forty-five years did not raise a conclusive presumption that they had been so used before *Magna Charta*, and that the fishery commissioners were not bound by a conclusive presumption of law to say that because there was no evidence to negative an origin before the time of legal memory, the right must have existed before that period. With respect to other engines, of which a user of twenty years only was proved, the Court held that the commissioners in the case would not have been justified in assigning to them an origin before *Magna Charta*. In a similar case,² the Court of Common Pleas held that if during all living memory the enjoyment of the right claimed had been uniform and unvarying, and consistent also with the ancient documents of title, that the commissioners would have been bound to refer it to a legal origin,—as by grant, charter, or immemorial usage, if possible.³

¹ L. R., 3 Q. B. 639; 37 L. J., Q. B. 185; 18 L. T. 817.

² *Rawstorne v. Backhouse*, L. R., 3 C. P. 67; 17 L. T. 441; see *Reg. v. Downing*, 11 C. C. C. 580, where evidence that the prosecutor and his father had for forty-five years exercised the sole and

exclusive right of oyster fishing, and that a verdict had been given in 1846 for the prosecutor in an action to try his right, was held sufficient to support an indictment for stealing oysters from the bed.

³ See also *Goodman v. Saltash Corporation*, 7 App. Cas. 633, *ante*, p. 337.

It has been said that rights of fishery may be claimed both in gross—i.e. by special grant or prescription—or as appurtenant to a manor¹ or to land. It would seem doubtful whether this will apply to a several fishery in a public navigable river. It was held at nisi prius by Heath, J.,² that a several fishery may be appurtenant to a manor; and this is approved by Willes, J., in *Shuttleworth v. Le Fleming*.³ In the Irish case of *Hayes v. Bridges*,⁴ the Court held that an exclusive right of fishery might be prescribed for as appurtenant to land. In the case of *Edgar v. The Special Commissioners of Fisheries*,⁵ this question is discussed in an elaborate judgment by the late Mr. Justice Willes, who seems to doubt whether such an extensive right as a right to take all the fish in a public navigable river could be claimed as appurtenant to land. “You may have,” he says, “a fishery appurtenant to land—and one has seen pleadings in which this sort of thing was claimed—that he and all he has in the said house have fished as appurtenant to the land; but when you come to prove the right, can you show under such a claim as that, an exclusive right to take all the fish in a particular place? Can you show an exclusive right to take all the fish in a navigable tidal river? It has been decided over and over again that a right of that kind must be in some way connected with the enjoyment of the house. No doubt they might have the use of the fishery for the house; or even for their pleasure it might be connected with the enjoyment of the house. But a right to a fishery for the purpose of catching all the fish and excluding others for purposes of trade—that is, putting them in boxes and sending them off in ice—does not appear to be at first sight connected with the enjoyment of the house, and particularly not with the enjoyment of lands and ancient tenements as apart from the enjoyment of the house. It may be annexed to land, but you must have it for the use of the house by those who hold the land. Therefore it would be well to consider, if that question is worth anybody’s while to raise, whether you can have an exclusive right to take all fish in a navigable river simply as appurtenant to land.”

As appurtenant to manors or lands.

The right to a several fishery in tidal waters is, as has been

Several fishery a franchise.

¹ As to title to fishery appurtenant to barony lands under Scotch law, see *Lord Advocate v. Lorat*, 5 App. Cas. 773; and cases ante, p. 342, n. 2.

² *Rogers v. Allen*, 1 Camp. 305; 10

R. R. 689; see also *Reg. v. Stimson*, 4 B. & S. 301.

³ 19 C. B., N. S. 702.

⁴ 1 R., L. & S. 390.

⁵ 23 L. T., N. S. 732.

said, a franchise originally granted by the Crown. A well-known distinction exists between such franchises as upon forfeiture may exist in the Crown, and therefore be capable of re-grant, and such others as cannot exist in the Crown, but only in a grantee from the Crown, and therefore become actually extinct upon forfeiture.¹ In the case of *The Duke of Northumberland v. Houghton*,² the plaintiff claimed a several fishery in the Tyne, which he proved to have existed from time immemorial, and therefore to have a legal origin, having been originally granted before Magna Charta to the prior and monks of a monastery. The defendants proved that after Magna Charta the original grantees had forfeited their liberties and free usages, and contended that under these words a several fishery was included, and that the fishery, having been forfeited, had merged, and could not be regranted by the Crown. The Court held that plaintiff was entitled to judgment,—Martin, B., being of opinion that a several fishery is one of those franchises which does not merge upon being resumed by the Crown, either by forfeiture or otherwise,—Kelly, C. B., and Pigott, B., apparently being of the same opinion, but holding that as the words liberties and free usages did not include a several fishery, the question of merger did not arise.³

Effect of
grant.

The right of an exclusive fishery in the sea and tidal waters, being a royal franchise, is not a territorial right, and is capable of being held by a subject either with or without the ownership of the soil. Thus on the sea shore, where the Crown is owner *primâ facie* of the soil between high and low water mark, and in public navigable rivers, where it is owner *primâ facie* of the whole bed up to high water mark, a grant might have been made before Magna Charta by the Crown to a subject, either of the soil and the fishery together, or of the soil alone, or of the fishery alone,—the two rights being separable. A grant of the foreshore between high and low water mark will not of itself convey the right to a several fishery over it.⁴ In general it will be a question of construction of the ancient grants under which

¹ See Paterson's Fishery Laws, p. 18; as to this point and as to the claim by the Crown to the franchise of a several fishery in non-tidal waters, see *Devonshire v. Pattinson*, *post*, p. 365.

² L. R., 5 Ex. 127; 39 L. J., Ex. 66; 22 L. T. 491.

³ As to this point, see also Paterson's Fishery Laws, p. 18, in case of *Abbot of Strata Marcella*, 9 Rep. 24 a; *Heddy v.*

Wheelhouse, Cro. Eliz. 591; *R. v. Mayor of London*, 1 Shaw, 230; for further cases as to regrants by the Crown of several fisheries, see *Little v. Wingfield*, 18 Ir. C. L. R. 299; *Tighe v. Sinnott*, (1897) 1 Ir. R. 140; *Warrand v. Mackintosh*, 15 App. Cas., H. L. Sc. 52.

⁴ *A.-G. v. Emerson*, (1891) App. Cas. 649; see *post*, p. 356.

the claim is made, explained by user subsequent to their date, what is the measure of the right.¹ As a fact an exclusive fishery in tidal waters is generally, though not always, coupled with the exclusive ownership of the soil, as in the case of private streams, and though *prima facie* the Crown is entitled to every part of the shore and bed of tidal waters, proof (at any rate by the lord of an adjoining manor) of the ownership of a several fishery raises a presumption that the soil is in the owner of the several fishery.²

In the case of *The Duke of Somerset v. Fogwell*,³ a grant by the Crown of lands, and all waters, fisheries, &c. to the aforesaid manors, castles, and premises belonging and appendant, was held to pass a several fishery in a tidal navigable river as an incorporeal hereditament only, and not to pass the soil, Bayley, J., remarking, "Considering the nature of the franchise and the law as to rights of fishery in other rivers, I have no difficulty in saying that in my judgment this was not a territorial but an incorporeal franchise."

A grant of sea-grounds, oyster layings, shores, and fisheries has been held to pass the soil also,⁴ as has a grant of all those fishings of the halves and halvendoles, with the appurtenants to the halves due and accustomed within the river Severn within a manor, and of all royal fishes, under an annual rent.⁵ The words used in these two cases quite admit of the larger construction, Lord Ellenborough, in the latter case, saying, "I think it appears distinctly that these halves and halvendoles are of the nature of land. I cannot consider it otherwise than the grant of something territorial."⁶

¹ Paterson, p. 20; see *Duke of Beaufort v. Swansea*, 3 Ex. 413. A grant of "fishings" merely is not a grant of salmon fishings; but a grant of "fishings" merely, if followed by the requisite endurance of possession, will establish a right of salmon fishing, even against the Crown. A party claiming a right of salmon fishings must either show a grant of salmon fishings, or a grant of fishings generally, followed, for the requisite period, by the exercise of the right of salmon fishing: *Lord Advocate v. Sinclair*, L. R., 1 H. L. Sc. 176; see *McDonall v. Lord Advocate*, L. R., 2 H. L. Sc. 431, per Cairns, C. Proprietors on the sea coast having grants from the Crown with right of fishing limited to fishing with net and coble, cannot, on the suit of owners of fisheries in a river, be restrained from

fishing with stake nets: *Kintore v. Forbes*, 4 Bli., N. S. 485; 33 R. R. 50; see also *McDonall v. The Lord Advocate*, L. R., 2 H. L. Sc. 431; *Stuart v. McBarnet*, L. R., 1 H. L. Sc. 387; as to Scotch barony titles to fishery, see *Lord Advocate v. Lorat*, 5 App. Cas. 773.

² *A.-G. v. Emerson*, (1891) App. Cas. 649; *Hanbury v. Jenkins*, (1901) 2 Ch. 401, and cases *ante*, pp. 27 *et seq.*

³ 5 B. & C. 884; 29 R. R. 449; as to private streams, see *post*, pp. 368 *et seq.*

⁴ *Scrotton v. Brown*, 4 B. & C. 485; 28 R. R. 344.

⁵ *R. v. Ellis*, 1 M. & S. 652; see also *Gray v. Bond*, 5 Moore, 527; 23 R. R. 530; 1 Hale de Jure Maris, 1 Harg. 34.

⁶ See as to ownership of sea shore by exercise of several fishery by "kiddles," *A.-G. v. Emerson*, (1891) App. Cas. 649; and cases *ante*, p. 28.

*A.-G. v.
Emerson.*

In *A.-G. v. Emerson*,¹ which was a claim to part of the foreshore of the sea by the lord of the adjoining manor, who was also the owner of a several fishery exercised by "kiddles," the House of Lords held that such a right raised the presumption that the freehold of the soil was in the owner of the several fishery. Lord Herschell, in delivering the judgment of the House, says, "It is not now in dispute that the defendants are possessed of a several fishery over a part of the foreshore; but it is said, and truly, that this is not inconsistent with the foreshore over which this right is possessed being still in the Crown. A grant of the foreshore between high and low water mark admittedly would not of itself convey the right to a several fishery over it. On the other hand, a several fishery might be granted independently of the ownership of the soil. But it is said that the possession of a right of several fishery is evidence of the ownership of the soil over which it is exercised. It has undoubtedly been laid down in more than one case, that the ownership of a several fishery raises a presumption that the freehold is in the grantee of the several fishery. And Parke, B., in delivering the judgment of the Exchequer Chamber in *Holford v. Bailey*,² said, 'A several fishery is, no doubt, *primâ facie* to be assumed to be in the soil of the defendant.' And, although in *Marshall v. Ulleswater Steam Navigation Co.*,³ Cockburn, C. J., stated, 'That apart from authority, he should have come to a different conclusion,' the Court adopted the law laid down in *Holford v. Bailey*." After discussing *Duke of Somerset v. Fogwell*⁴ he states that "it is unnecessary to inquire whether the conclusion arrived at in that case, that the terms of the grant were known, was correct; the presumption, so far from being denied, appears to me to be recognized." And, he adds, "Finding, then, such high authority for the proposition that the ownership of a several fishery is evidence of the ownership of the soil, I am not disposed to depart from it."⁵

The respondents exercised the right of fishing by *kiddles*—a series of stakes forced into the ground, occupying some 700 feet in length, and a similar row approaching them at an angle, the stakes being connected by network, and remaining in the soil

¹ (1891) App. Cas. 649.

² 13 Q. B. at p. 444.

³ 8 B. & S. 732; 32 L. J., Q. B. 139.

⁴ *Ante*, p. 355.

⁵ (1891) App. Cas. at pp. 654, 655.

for long periods. As to this Lord Herschell quotes Lord Hale as to the difference between several kinds of fishery, either (1) with the net (which may be either a liberty without the soil or a liberty arising in concomitance with it); or (2) "a local fishing " that ariseth by and from the propriety of the soil. Such are " *gurgites, weares, fishing places, borachia, stachia, &c.*, which are " the very soil itself, and so frequently agreed in our books."¹

After stating that it is unnecessary on the present occasion to determine whether "the right to maintain such structures as " Lord Hale refers to necessarily imparts in all cases the owner-ship of the soil, nor whether a kiddle such as has been proved " to be in lawful use on the foreshore in question falls within " the class specified by Lord Hale," he concludes that "it is " impossible, I think, to deny that the right to maintain such a " kiddle affords cogent evidence that the person possessing this " right is owner of the soil."²

It has been held in two late cases that the right of the Crown before Magna Charta to grant a several fishery in public rivers is derived from its ownership of the soil of the bed, and that, therefore, a several fishery granted by the Crown in a public navigable river, which afterwards changed its course and flowed over the land of an adjacent proprietor, could not be followed to the new channel, on the ground that the new channel was not the property of the Crown.³ But in *Miller v. Little*,⁴ the plaintiff and defendant and their respective predecessors in title, had respectively exercised the exclusive right of fishing in an estuary, each to the middle thread of a river flowing through it. No grant from the Crown of the fisheries was proved, but it was the common case of both parties that the right of fishing in the entire estuary was vested in them to the exclusion of the public. The river changed its course and formed a new channel, still passing through the estuary; and the Court held that the local limit of each fishery was the middle of the new channel of the river, and not a landmark corresponding to what had been the *medium filum aquæ* of its former course. *Semble*, per May, C. J., the grantee from the Crown of the fishery in such a river would not be deprived

Where a
river changes
its course

¹ Hale de Jur. Mar. Pars. Prima Cap. 5, p. 18, Hargreaves' Tracts.
² (1891) App. Cas. at pp. 656, 657; see also *Lord Donegal v. Lord Templemore*, 9 Ir. C. L. R. 374, and judgment of Lindley,

L. J., in *Hindson v. Ashby*, ante, p. 73.
³ *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; *Murphy v. Ryan*, Ir. R., 2 C. L. 143.

⁴ 4 L. R., Ir. 302, C. A.

of his right to the fishery by any change in the course of the river over the foreshore, but, notwithstanding such change, would be entitled to the fishery of the river wherever its course might be found, so far as the channel traversed ground the property of the Crown, the grantor.¹

In *O'Neil v. M'Eilaine*,² by letters patent of Jac. I. and Car. II., the Crown granted a several fishery within certain limits in the river Bann in Ireland. A channel, called the New Cut, divides the river within the limits of the fishery into two branches. It was found by a verdict on an issue directed by the Court, that the New Cut is now part of the river Bann, but that there was no evidence to show whether it existed at the time of the grant, or whether it was a natural or an artificial channel. *Held*, that the letters patent did not give the right to a several fishery in the New Cut unless it was a branch of the river Bann at the time of the grant.³

From these cases it would appear that no grant by the Crown of a several fishery in the sea below low water mark would be valid, the soil not being in the Crown, but without the realm.⁴

Free fishery.

A free fishery—i.e., a right of fishing not exclusive—may also exist in tidal waters and public rivers. The modes of origin and incidents to this right will not differ materially from those of a several fishery—the main distinction being that it is a co-extensive right enjoyed by two or more persons instead of an exclusive right enjoyed by one alone.⁵

User of fisheries.

The owner of a fishery has not of necessity a right to land on the shore above high water mark without the assent of the owners of the freehold.⁶ In cases of grants to individuals it is often a question of construction whether the right to use the banks for the purpose of the fishery is impliedly granted, and this appears to depend on whether it is necessary to the exercise of the fishery that such banks should be used.⁷ The open enjoyment of a right of

¹ See also *Donegal v. Templemore*, 9 Ir. C. L. R. 374.

² 16 Ir. Ch. R. 280.

³ Where a piece of land on the banks of a tidal river is exchanged, the right of salmon fishing therein being expressly reserved, a grant in 1873 of that salmon fishing, though from the Crown, will not deprive the prior owner of his right: *Richardson v. Gray*, 3 App. Cas., H. L. Sc. 1.

⁴ See *Reg. v. Keyn*, 2 Ex. Div. 63; 46 L. J., M. C. 17; *ante*, p. 6.

⁵ See *ante*, p. 341.

⁶ *Eckroyd v. Caultard*, (1898) 2 Ch. 258; 67 L. J., Ch. 458; 78 L. T. 702, and *ante*, p. 345; Woolrych on Waters, p. 167; *Ipswich v. Browne*, Savil. 2. See also *Ilchester v. Rushleigh*, 5 T. L. R. 739; 61 L. T. 477; *ante*, p. 16, n. 4.

⁷ Paterson's Fishery Laws, p. 30. See *R. v. Ellis*, 1 M. & S. 666; Co. Litt. 59 b; *Lifford's case*, 11 Rep. 52; 1 Wms. Saund. 323, n. 6; Shep. Touch. 89; *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 683. *Semble*, an incorporeal right of way along both banks of a river may be appended to an incorporeal right of

landing and drawing nets, and of occasionally sloping and levelling the shore for twenty years, has been held sufficient to warrant a judge in directing a jury to presume a grant of such right.¹

The right of fishery in the sea and navigable rivers is subordinate to the right of navigation, and cannot be used in any way so as to derogate from or interfere with such right.² A grantee of the Crown takes subject to this right, and cannot, in respect of the ownership of the soil, make any demand, even if expressly granted to him, which in any way interferes with enjoyment of this public right.

Thus a claim to take toll from all vessels anchoring within the limits of an oyster fishery cannot exist merely in respect of the use of the soil.³

Where both the rights of navigation and of fishery are incompatible, the fisherman must give way to the navigation of vessels,⁴ but the navigator must do the least possible injury to the fisherman, for he is in the exercise of a lawful right. Thus, where oysters were placed in a public navigable river, so as to be a nuisance to the navigation, it was held that the liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float, and consequently it is no excess of the right if a vessel, which cannot reach her destination in a single tide, grounds on the oyster bed till the tide serves, but that a person navigating is not justified in damaging such property by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public, and therefore the fact that such property is a nuisance is no excuse for running against it negligently.⁵ The nature of the right was not affected, even though the vessel grounding might be liable to compensation for the injury done.⁶

All weirs appurtenant to fisheries, and all other fixed engines for taking fish which obstruct the whole or part of the navigation

Weirs, &c.
obstructing
navigation.

fishing: *Hanbury v. Jenkins*, (1901) 2 Ch. 401; see also Co. Litt. 121 b, Hargraves and Butler's ed., note 7.

¹ *Gray v. Bond*, 2 B. & B. 667; 23 R. R. 530; see *ante*, p. 346.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; 35 L. J., C. P. 29; 12 L. T. 150; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 285; 21 L. T. 804; *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

³ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192.

⁴ *Anon.*, 1 Camp. 516, n.; see Paterson, p. 32.

⁵ *Mayor of Colchester v. Brooke*, 7 Q. B. 339; 15 L. J., Q. B. 59.

⁶ *Ibid.* 373, and per Coltman, J., at p. 355; see also *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Dimes v. Petley*, 15 Q. B. 329.

of a public navigable river, are illegal, and a nuisance unless granted by the Crown before the reign of Edward I.¹

The right to maintain a weir in a public navigable river came into question in the year 1839 as to the river Severn.² The weir in question was proved to have existed since the time of the Domesday Book, and the question was whether the Crown had the right before Magna Charta to authorize the erection of weirs interfering with the public right of navigation. The Court held, that the common law right was and always had been paramount to the power of the Crown to interfere by grant, but that the statute of 25 *Edw. III. c. 4*, which directed the destruction of all gorges,³ mills, weirs, stanks, stakes, and kiddles⁴ which had been set up in the time of Edward I. and subsequently, legalized by implication all those erected before that time, though in strictness they were illegal at common law. It, therefore, follows that if a weir obstructing the navigation can be shown to have existed before the time of Edward I., it must be held to be legal.⁵

Weirs obstructing fishery in public rivers.

The question whether weirs and fixed engines for taking fish in public navigable rivers, but which do not interfere with the navigation, are illegal and a nuisance, is not quite so clear. So far as salmon are concerned, the question is practically provided for by the Salmon Fishery Acts;⁶ but as regards other fish, and where the Salmon Acts do not apply, the question is still of some importance.⁷ It would appear, as has been before stated, that the public have a right in the sea and navigable rivers to catch all the fish they can by all means which are not inconsistent with the rights of others.⁸ This authorizes them to use lawful nets,⁹ but could not authorize the erection by them of weirs or the fixing to the soil of fixed engines, which would be a *purpresture* on the soil of the Crown. Further, no prescriptive right could be acquired to such erections, it having been held that the fishing in the sea being common, a prescription for such a right

¹ 25 *Edw. III. stat. 4. c. 4*; 45 *Edw. III. c. 2*; 1 *Hen. IV. c. 12*; 12 *Edw. IV. c. 7. s. 3*.

² *Williams v. Wilcor*, 8 A. & E. 314; 47 R. R. 595.

³ A deep pit of water or gulf; Co. Litt. 5 (a).

⁴ Open weirs, whereby fish are caught; 2 *Inst.* 38.

⁵ As to what evidence is necessary to prove the existence of this immemorial right, see *Holford v. George*, L. R., 3 Q. B. 639; *Raestorne v. Buckhouse*,

L. R., 3 C. P. 67, and *ante*, pp. 350 *et seq.*

⁶ See *post*, pp. 386, 399 *et seq.*

⁷ Fishing with stake nets on the sea coast, near the mouth of a river, is not prohibited either by the statute or the common law of Scotland: *Kintore (Earl) v. Forbes*, 4 Bli., N. S. 485; 33 R. R. 50; as to fishery with close cruives net and coble, see *Lord Advocate v. Lovat*, 5 App. Cas. 273.

⁸ *Ante*, p. 346.

⁹ *Warren v. Mathews*, 6 Mod. 73.

is void.¹ Moreover, though the early statutes from Magna Charta to 1 *Hen. IV. c. 12*, which order the destruction of all weirs throughout the kingdom with the exception of those existing prior to the reign of Edward I., and forbid the erection of new weirs, and the enhancement or enlarging of ancient ones, have been held² to refer to navigable rivers only, and to the obstruction of the navigation, as the sole ground for putting them down; yet it appears to be the opinion of the Court of Queen's Bench, that the later statutes 4 *Hen. IV. c. 11*, 2 *Hen. VI. c. 19*, and 12 *Edw. IV. c. 7*, which recite the earlier statutes, and expressly refer to the protection of the young fry of fish as one of the objects for enforcing them, make such weirs and fixed engines as facilitate the destruction of young fish, illegal and a nuisance.³

With regard to the right of the owner of a several fishery in a public navigable river to maintain a weir, inasmuch as the right to the several fishery itself must be traced to an origin before Magna Charta, his right to maintain a weir as appurtenant thereto would require an equally ancient title to make it legal, otherwise it is a public nuisance.

Where a right to an ancient weir has been established, the weir must not be enhanced, straitened, or enlarged, so as to be a public nuisance.

In addition to a liability to indictment for a public nuisance, the owner of a fishery who interferes in an unauthorized manner with the passage of fish up a river, will be liable to an action for damages at the suit of another owner prejudiced thereby.⁴ Thus where the defendant, who was the owner of an ancient weir made of brushwood, through which salmon could pass, converted the same into a solid stone weir impervious to fish, it was held that the plaintiff, the owner of a fishery above him, could recover damages for the injury to his fishery.⁵ In the case of *Marquis of Donegal v. Hamilton*,⁶ where the owner of a lower fishery on the Bann made weirs, cuts and traps, by means of which the current of the stream was altered, and so the passage of trout,

Obstructions
to fishery
actionable.

¹ *Ward v. Cresswell*, Willes, 265; *Berins v. Hird*, 12 L. T., N. S. 306.

² *Rolle v. Whyte*, L. R., 3 Q. B. 286; 37 L. J., Q. B. 105; 17 L. T. 560; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657; 39 L. J., C. P. 305; 23 L. T. 155.

³ *Rolle v. Whyte*, per Cockburn, C. J., L. R., 3 Q. B. 301; *Holford v. George*, L. R., 3 Q. B. 639.

⁴ *Weld v. Hornby*, 7 East, 195; 8 R. R.

608, per Lord Ellenborough, C. J.; *Leconfield v. Lonsdale*, L. R., 5 C. P. 726, per Bovill, C. J.; Lib. assiz. 246; see also O'Hagan, J., in *Murphy v. Ryan*, Ir. R., 2 C. L. 148; Co., 2 Inst. 30; Woolrych, p. 197.

⁵ *Weld v. Hornby*, 7 East, 195; 3 Sm. 244; 8 R. R. 608.

⁶ 3 Ridg., P. C. 267.

salmon, and other fish was prevented, it was held that the plaintiff, an upper proprietor on the river, had a right of action. Fitzgibbon, L. C., in the case says:¹ "It is clear that the plaintiff, as proprietor of the upper fishery, has a right to the full possession of the water, the element of his fishery, in the same plight and condition in which he enjoyed it when the corporation, under whom the defendant derives, obtained their grant from the Crown; he has a right to a free passage for fish from the sea into his fishery, and he has a right to catch as many fish as he can catch by his industry and art which find their way into his fishery. It is clear that the defendant has the same rights as proprietress of the lower fishery. She has a right to the same full possession of the water, to a free passage of fish from the sea into her fishery. And she has a right abstractedly to catch every fish, which finds its way into her fishery, which she can lay hold of by her art or by her industry. But in the exercise of this right, she cannot alter the state, plight, or condition of the water of the plaintiff's fishery from the state, plight, and condition in which she enjoyed it at the time when the corporation, under whom she derives, obtained their grant to the injury of plaintiff's fishery; nor can she stop or obstruct the passage of fish from the sea into the plaintiff's fishery in any manner not essentially necessary to enable her to exercise her right of catching fish in their passage up the river."²

Fishery in Private Streams.

Belongs
primâ facie to
owners of the
bed as a
territorial
right.

In all rivers and streams above the flow and reflow of the tide, whether such rivers are navigable or not, the proprietors of the land abutting on the stream are *primâ facie* owners of the soil of the *alveus* or channel *ad medium filum aquæ*, and as such have *primâ facie* the right of fishing in front of their land.³ "According to the well-established principles of the common law," says O'Hagan, J., "the proprietors on either side of the river are presumed to be possessed of the bed and soil of it moiety to a supposed line in the middle, constituting their

¹ 3 Ridg., P. C., p. 323.

² As to obstruction of fishery by a weir in a trout stream, see *Barker v. Faulkner*, 79 L. T. 26, *post*, p. 372.

³ *Bickett v. Morris*, L. R., 1 Sc. App. 47; 14 L. T. 835; *Wishart v. Wyllie*, 1 Macq., H. L. 389; *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 361; *Murphy v.*

Ryan, Ir. R., 2 C. L. 143; *Lamb v. Newbiggen*, 1 Car. & K. 549; *Partheriche v. Mason*, 2 Rep. 658; *Fitzwalter's case*, 1 Mod. 106; Hale de Jure Maris, p. 1; Bracton, lib. 1, c. 28, 31; see also *Cooper v. Phibbs*, L. R., 2 H. L. 165, per Lord Cranworth.

"legal boundary, and being so possessed, have an exclusive right "to the fishery in the water which flows above their respective "territories."¹ Where a man possesses land on both sides of the water, he has *primâ facie* the sole right of fishing therein.²

In the case of *Foster v. Wright*, where a river had formerly flowed wholly within the lands of one proprietor, and had by gradual and imperceptible degrees worn away its banks, and approached, and eventually encroached, upon the lands of the defendant, a proprietor adjoining, it was held, that the ownership of the soil of the bed still remained in the former proprietor, and that he could maintain an action of trespass against the defendant for fishing on a strip of the bed which, before the encroachment, had been his, defendant's, property.³

This right is a right of property, one of the profits of the land, and has been called a *territorial fishery*.⁴ It is not, strictly speaking, a riparian right arising from the right of access to the water,⁵ but is a profit of the land over which the water flows, and as such may be transferred or appropriated either with or without the property in the bed or banks to another person, whether he has land or not on the borders of, or adjacent to, the stream.⁶

As this right, in the case of opposite proprietors, only extends *primâ facie* to the middle line of the water, each can only fish, whether with rods or nets, up to that boundary; and if either casts his net or line beyond that boundary, he is liable to an action of trespass, unless he can prove a right to the whole fishery.⁷

The rights of shooting and fowling, unless specially reserved in a lease, are vested in the occupier or tenant of the lands, and not in the landlord.⁸ In an ordinary lease of lands, including waters or streams, the right of fishing is necessarily implied as part of the general right to the soil and water unless the lessor specially reserves it. If, therefore, there is no special reservation

Is vested in
the occupier
of the lands.

¹ *Murphy v. Ryan*, Ir. R., 2 C. L. 148; *Peurce v. Scotcher*, and cases cited pp. 347 *et seq.*

² See Paterson's Fishery Laws, p. 49; *Orr Ewing v. Colquhoun*, 2 App. Cas. 856. It would seem that even a *primâ facie* title to fish for salmon on one side of a river will give a right of challenge against fishing for salmon on the opposite side: *Stuart v. McBarnet*, L. R., 1 H. L. Sc. 387, per Lord Cairns, L. C.

³ 4 C. P. D. 438; 49 L. J., C. P. 97; see *ante*, pp. 69 *et seq.*; see *Hindson v. Ashby*,

per Lindley, L. J., *ante*, p. 73.

⁴ *Ante*, p. 337.

⁵ See *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; 45 L. J., Ch. 68; 35 L. T. 569.

⁶ *Marshall v. Ulleswater Co.*, 3 B. & S. 732; 41 L. J., Q. B. 41; 25 L. T. 793; *Bristowe v. Cormican*, 3 App. Cas. 665.

⁷ *Beauman v. Kinsella*, Ir. R., 11 C. L. 249; *Zetland v. Glover Incorporation*, L. R., 2 H. L. Sc. 70; Paterson, p. 109.

⁸ See 2 Will. IV. c. 32.

of the right of fishery, the tenant and not the landlord will be the party entitled to the fishery.¹ Unless there is such a reservation the landlord cannot go on the banks of a stream for the purpose of fishing.²

Properly speaking, the right cannot be reserved by a lease, but what is practically the same thing, the reservation is construed as a re-grant by the tenant to landlord.³

Claims by
lords of
manors.

The presumption that the owner of the soil of the bed of a non-tidal river is also owner of an exclusive right of fishing therein, may be rebutted, but if not rebutted it is the legal presumption.⁴ If, therefore, the lord of a manor would intrude his claim, he must make it out by evidence of his own, as by deed, and the presumption that a several fishery passed to the lord as appurtenant to a manor under a deed, has been held to be rebutted by proof, that before the date of the deed the owners of the land had the right of free fishery.⁵

In waste
lands.

The lord of a manor, being *primâ facie* the owner of the waste lands of the manor, will be *primâ facie* entitled to the right of fishing in the waters of the waste.⁶ But a several fishery-vested in the lord as owner of the soil of the bed of a river is a territorial right, and is not, on an allotment of waste, reserved to him by the usual clause in an inclosure Act reserving to him all his royalties, franchises, &c. For this purpose there is no difference between rights of fishing and rights of shooting. *Devonshire (Duke) v. O'Connor*⁷ followed.⁸ The words common or waste land, however, mean only those commonable lands of which the soil is in the lord, and not open fields where owners had rights in severalty.⁹ A lord of a manor is not justified in making such a store place for fish as to disturb the commonable rights of his tenants.¹⁰

¹ Paterson's Fishery Laws, p. 67, approved and adopted in *Davies v. Jones*, (1902) 18 T. L. R. 367; Oke's Game Laws, p. 118.

² *Davies v. Jones*, *supra*.

³ *Graham v. Ewart*, 7 H. L. 331; *Seymour v. Courtenay*, 5 Burr. 2817; Paterson, Fishery Laws, p. 68.

⁴ See *Wishart v. Wyllie*, 1 Macq., H. L. 389; *Hunbury v. Jenkins*, (1901) 2 Ch. 401.

⁵ *Lamb v. Newbiggen*, 1 Car. & K. 549. See also *Grand Union Canal v. Ashby*, 6 H. & N. 403; see also *Priest v. Archer*, 51 J. P. 725.

⁶ See Paterson, Fishery Laws, p. 54; Oke's Game Laws, pp. 50, 128; *Cornwell v. Saunders*, 32 L. J., N. S., M. C.

6; *Graham v. Ewart*, 26 L. J., N. S., Ex. 97; 7 H. L. Cas. 331; as to this question with regard to a pond on the waste of a manor, see *Clarke v. Mercer*, 1 F. & F. 492.

⁷ 59 L. J., Q. B. 206; 24 Q. B. D. 463.

⁸ *Eckroyd v. Coulard*, (1898) 2 Ch. 258; 67 L. J., Ch. 458; 78 L. T. 702, C. A.

⁹ *Grand Union Canal v. Ashby*, 6 H. & N. 394; 30 L. J., Ex. 203; 3 L. T. 678.

¹⁰ Cro. Car. 495; *Reere v. Digby*. See also as to manors, Williams's Real Property, 119; *Doe d. Barrett v. Kemp*, 2 Bing., N. C. 102; 33 R. R. 492; *Grose v. West*, 7 Taunt. 39; 17 R. R. 437; *Smith v. Earl Brownlow*, L. R., 9 Eq. 241; *Warrick v. Queen's College*, L. R., 6 Ch. 716.

Thus, if any one claims a right of fishery in another's water, the onus of proof is on him.

In the case of *Devonshire v. Pattinson*,¹ the question arose whether the Crown ever could have as part of its prerogative an exclusive right of fishery in a non-tidal river flowing over the soil of a subject, and whether if the Crown could have such right it could be granted to a subject as a franchise. As in this case the Court of Appeal was of opinion that the Crown was also owner of the bed of the river as lord of the manor, they did not actually decide this question, but they did not adopt the view of the Divisional Court on the point. Lord Justice Fry, delivering the judgment of the Court (Lord Esher, M. R., and Bowen and Fry, L. JJ.), says: "Such being the ancient and modern user "of the fishery, it is plainly incumbent on the Court to find a "legal origin for it if such can be found. The defendants say "that no such legal origin can be found. A. L. Smith, J., has "come to the conclusion that the fishery enjoyed by the Duke "and his predecessors entitles it to be regarded as a franchise, "i.e., a right in the hands of a subject derived by a grant from "the Crown of a prerogative. If the Crown were both owner of "the bed of the river and of the right of fishing, it is obvious "that the right of fishing would be a proprietary and not a "prerogative right, and consequently the view of the learned "judge gives rise to the inquiry whether the Crown could, as "part of its prerogative, have an exclusive right of fishing in "the water flowing over the soil of a subject; and, secondly, "whether such a right could be granted to a subject so as to "be a franchise in his hands. The third chapter of the first "part of *Hale's Treatise de Jure Maris*, and the forms of writ "there given in relation to the defence of rivers, appear to us "to establish that prior to the Great Charter of Henry III., the "king had exercised as part of his prerogative a right to cause "various rivers, including fresh rivers above the flow of the tide, "to be put in defence, i.e., to be kept close in anticipation of "a visit of the king for the purpose of fishing the river; and "further, that he required certain men, who were anciently "liable to perform the duty, to make preparations for his "arrival by the construction of bridges; that this prerogative "was exercised by means of a writ addressed to the sheriff "requiring him to put the river in defence; and that after

Claim by the
Crown.

¹ 20 Q. B. D. 263; 57 L. J., Q. B. 189; 58 L. T. 392.

“Magna Charta the prerogative was still exercised, but only in regard to rivers which had been put in defence in the reign of Henry II. But, assuming this prerogative to have existed, we entertain serious doubts on the following questions : first, whether the prerogative would have authorized the king to close the river against the owner of the soil, or to grant any right in the river, except in preparation for a royal visit ; secondly, whether the prerogative was not of a purely personal character, existing only for the pleasure of the king and his court, and consequently whether the prerogative could be granted by the king so as to become a franchise in the hands of a subject ; and, thirdly, if it could be held by a subject as a franchise, whether it would confer on the subject a permanent right to fish to the continued exclusion of the owner of the soil. The case of the king’s prerogative of Saltpetre (12 Reports, page 12), shows that the prerogative of purveyance being vested in the Crown for purposes of defence, cannot be granted or transferred to any other ; and it is possible that the prerogative of putting rivers in defence may have existed for the royal pleasure only, and so could not be granted to a subject. No authority has been cited or come to our knowledge which tends to dispel the doubts we have stated ; moreover, it does not appear that in any one of the numerous cases with regard to fisheries to be found in the books, a right to an exclusive fishery has been maintained either by proof or presumption of the existence of such a franchise as that in question. For these reasons, we feel a hesitation in adopting the view entertained by the learned judge.

“In our opinion, the true conclusion to be drawn from the user and the documentary evidence is that in 1629, when King Charles I. granted the manor of the socage to trustees for his queen, and again in 1696, when King William III. granted the reversion expectant on this term to the Duke of Portland, the river bed throughout the manor and the fishery in the river flowing over the same were parcel of the manor of the socage, that they passed as such to the grantees of the Crown, and that the enjoyment of the fishery by the Earl of Carlisle and the Dukes of Portland and Devonshire down to the present time is attributable to this title.”

A claim by
the public to
fish in private

It has been said before that a claim by the public to fish in non-tidal waters has been held to be such a claim as cannot

exist at law,¹ or be supported by immemorial user.² Moreover, a claim by custom for all the inhabitants of a parish to angle and catch fish in private waters,³ and a custom for the commoners, copyholders, and ancient freeholders of a manor, and their tenants, and the dwellers in the parish and manor to fish in the waste waters of a manor, have been held bad and unreasonable,⁴ on the ground that the right claimed was a *profit à prendre* on the soil of another, which might lead to the destruction of the subject-matter to which the alleged custom applied.⁵

waters cannot
exist at law,
or by custom.

In *Tilbury v. Silva*,⁶ the practice in a manor was for the lords to grant copyholds for three lives, and to renew at a fine upon the dropping of any of the lives; but there was no custom binding them to renew. The copyhold grants did not mention a right of fishing; but from time immemorial the copyholders had enjoyed a right of angling in a stream which formed the boundary of the manor, and of passing along the bank over the lands of other tenants of the manor for that purpose. Subject to this, the right of fishing was in the lords. In 1845 the lords enfranchised a copyhold belonging to S., which adjoined the river, and released in the most ample terms all rights of fishing and all other rights they had over the enfranchised tenement. After this various other copyholds were enfranchised, and for nearly forty years the copyholders and enfranchised copyholders exercised the same right as before of angling and going over the land of S. for that purpose. T. was the owner of several tenements formerly copyhold of the manor, which had been enfranchised since 1845. In 1885 S. set up a gate and prevented T. from passing over his land to fish. T. acquiesced in the interruption until 1889, when he commenced an action on behalf of himself and all other the owners and occupiers of copyholds or enfranchised copyholds, to establish the right of angling and of passing over the land of S. for that purpose:—The Court of Appeal held (affirming Kay, J.), that by the enfranchisement deed of 1845 the lords gave up all their rights over the land of S., and that no reservation or exception of a power to make to other tenants grants giving rights over that land could be implied, and

¹ *Hargreaves v. Diddams*, L. R., 10 Q. B. 587; 44 L. J., M. C. 78; *Musset v. Burch*, 35 L. T., N. S. 486; *Hudson v. McRae*, 4 B. & S. 585.

² *Murphy v. Ryan*, Ir. R., 2 C. L. 143. See *ante*, pp. 347 *et seq.*

³ *Bland v. Lipscombe*, 4 E. & B. 413.

⁴ *Allgood v. Gibson*, 34 L. T., N. S. 883.

⁵ *Race v. Ward*, 4 E. & B. 702; 24 L. J., Q. B. 153; see *Goodman v. Mayor of Saltash*, 7 App. Cas. 633, *ante*, p. 337.

⁶ 45 Ch. D. 98; 62 L. T. 254.

that the lords, therefore, had no power to give to T. by his subsequent enfranchisement deeds any rights over the land of S., and that T. had no title to maintain the action ; also, that lost grants of the rights to the enfranchised copyholders could not be presumed.

Where the public have been allowed to fish in private waters, even from time immemorial, the permission is revocable at any time at the will of the proprietor.¹

Several fishery apart from the ownership of soil.

Whether grant of, passes soil.

A several or exclusive fishery in private waters may exist in a stranger by grant or prescription from the owner of the soil as an incorporeal hereditament.² Such a fishery may, it would appear, be claimed as appurtenant to a manor, but not as appurtenant to land or a tenement, as being too extensive a right.³

The ownership of the soil of non-tidal rivers has been said to import a right to the exclusive fishery therein ; much controversy has arisen as to whether the converse of this proposition is true—viz., that the ownership of a several fishery imports the ownership of the soil. On this point Lord Coke thus expresses himself : “ If a man be seized of a river, and by deed do grant *separalem piscariam* in the same, and maketh livery of seisin *secundum formam chartæ*, the soil doth not pass, nor the water, for the grantor may take water there ; and if the river become drye, he may take the benefit of the soile, for there passed to the grantee but a particular right, and the livery being made *secundum formam chartæ* cannot enlarge the grant. For the same reason if a man grant *aquam suam* the soile shall not pass, but the pischary within the water passeth therewith.”⁴

In the case of *Holford v. Bailey*,⁵ Lord Denman, C. J., delivering the considered judgment of the Court, says, “ No doubt the allegation of a several fishery, *prima facie*, imports ownership of the soil, though they are not necessarily united.” In the case of *Marshall v. Ulleswater Co.*,⁶ this question again arose, and the majority of the Court, Wightman and Mellor, JJ., held that a grant of a several fishery, together with livery of seisin, reserving a quit rent of 4*d.* a year to the then lord of the manor, must, in the absence of evidence to the contrary, be taken

¹ See *Holford v. Bailey*, 13 Q. B. 426.

² *Marshall v. Ulleswater*, 3 B. & S. 732, per Wightman, J.; *Holford v. Bailey*, 13 Q. B. 426 ; 8 Q. B. 1016. See *Kinnersley v. Orpe*, Doug. 56.

³ Per Willes, J., in *Edgar v. Commissioners of Fisheries*, 20 L. T., N. S.

732, and *ante*, p. 351.

⁴ Co. Litt. 4 b.

⁵ 8 Q. B. 1000, at p. 1016. See also same case on appeal, 13 Q. B. 426.

⁶ 3 B. & S. 732 ; 41 L. J., Q. B. 41 ; 25 L. T. 793.

to convey a corporeal and not an incorporeal inheritance, as a feoffment with livery of seisin and the reservation of a quit rent are not appropriate to an incorporeal estate, and that, therefore, the soil passed by the grant. Cockburn, C. J., though holding himself bound by the case of *Holford v. Bailey*, was of a different opinion. After citing the opinion of Lord Coke, to the effect that a grant of a several fishery does not pass the soil, he proceeds:¹ "Now, independently of the high authority of Lord Coke on such a matter, I must say that this doctrine appears to me the only one which is reconcileable with principle or reason. It is admitted on all hands that a several fishery may exist independently of the ownership of the soil in the bed of the water. Why then should such a fishery be considered as carrying with it, in the absence of negative proof, the property in the soil? On the contrary, it seems to me that there is every reason for holding the opposite way. The use of the water for the purposes of fishing is, when the fishery is united with the ownership of the soil, a right incidental and accessory to the latter; on a grant of the land, the water and the incidental and accessory right of fishery would necessarily pass with it. If, then, the intention be to convey the soil, why not convey the land at once, leaving the accessory to follow? Why grant the accessory that the principal may pass incidentally? Surely such a proceeding would be at once illogical and unlawfulerlike."

In the case of *Bloomfield v. Johnson*,² where the Irish Court of Exchequer Chamber held, that the grant of a *free* fishery in Lough Erne did not pass the soil, Fitzgerald, B., in his learned and elaborate judgment, after citing with approval the opinion of Coke above mentioned, says,³ "I am aware of no case prior to that of *Marshall v. Ulleswater Navigation Co.*, in which anything really inconsistent with the position of Lord Coke can be said to have been decided. It may be questioned, whether for the decision of that case it was necessary to dispute Lord Coke's position; but undoubtedly the judges who made that decision, especially Cockburn, C. J., who was dissatisfied with it, but held himself bound by former authorities, do appear to lay it down as law, that the grant of a fishery by the owner of the soil in the water of that soil, would, if accompanied by livery of seisin, pass the soil. But *Holford v. Bailey*, and that class

¹ 3 B. & S. at p. 747.² Ir. R., 8 C. L. 68.³ Ibid. at p. 105.

“of cases which, for this purpose, decide only that the allegation
“in pleading or otherwise of the ownership of a several fishery
“generally does, *primâ facie*, imply the ownership of the soil, are
“the only authorities referred to, and this—I say it with deference
“—appears to me quite consistent with Coke’s position.”¹

In *Attorney-General v. Emerson*,² cited *ante*, p. 356, the House of Lords have held that a right of several fishery on the sea shore exercised by the lord of an adjoining manor by means of fixed “kiddles” raises the presumption that freehold of the soil is in him.

Free fishery.

A free fishery may exist in private waters by grant or prescription from the owner of the soil. It is sometimes also called a common of fishery, and is, as has been said, a right of fishery not exclusive in a particular place, and as such may exist in the owner of the soil in conjunction with a stranger, or in two or more strangers to the exclusion of the owner of the soil. “If he
“who is the owner of the soil, and as such entitled to the exclusive right of fishing, grant to another the right of fishing so
“as not to exclude himself, the grantee has a right of fishing
“not exclusive, but without the soil, and the owner of the soil
“retains the soil with a right of fishing no longer exclusive.
“The right of the grantee will be properly called—as all, I think,
“admit—a common of fishery. The right of the grantor is
“apparently something more; he has the ownership of the soil,
“the right of fishing incident thereto being no longer exclusive,
“but abridged by his grant; as against any one but his grantee,
“his rights are what they were before. If free fishery be the
“common name for this right of fishery in both cases, then, as
“applied to the grantee, it may be called synonymous with
“common of fishery; as applied to the grantor, it will be
“something more.”³

The ownership of a free fishery—i.e., a fishery not exclusive—does not import the ownership of the soil, and a grant of free fishery by the owner of the soil has been held not to pass the soil *ad medium filum aque*. Thus, in *Bloomfield v. Johnson*,⁴ where the question was whether a grant of lands adjacent to

¹ See Paterson, p. 65; *Rea v. Ellis*, 1 M. & S. 665, per Bayley, J.; *Duke of Somerset v. Fagiecell*, 5 B. & C. 875; 29 R. R. 449; *Huyes v. Bridges*, 1 R., L. & S. 420; *Scrutton v. Brown*, 4 B. & C. 485; 28 R. R. 344.

² (1891) App. Cas. 649.

³ *Bloomfield v. Johnson*, Ir. R., 8 C. L. 68, per Fitzgerald, B., at p. 107. See also Co. Litt. 122 a.

⁴ Ir. R., 8 C. L. 68; see *Alderman of London v. Hastings*, 2 Sid. 8.

Lough Erne and of a free fishery in the lake passed the soil *ad medium filum aque*, the Court of Exchequer Chamber in Ireland held it did not; Fitzgerald, B., being of opinion that, assuming that the presumption that by a grant of lands adjacent to a freshwater river (the grantor being owner of the soil of the river), the soil of the river passed *ad medium filum aque*, applied to such a water as Lough Erne, the grant of a free fishery, when a several fishery might have been granted, was sufficient to rebut the presumption that the soil was intended to pass.

The right of fishing in private waters is, of course, equally subordinate to the rights of navigation, which may have been acquired by the public over such waters by grant or prescription or Act of Parliament, and any interference with them will be a nuisance, and indictable.¹

User of
fisheries.

It has been held, however, that the provisions of Magna Charta and of the other early statutes, including 17 Ric. II. c. 9, and 12 Edw. IV. c. 7, which prohibit weirs, relate to navigable rivers only; and that though weirs in navigable rivers are illegal unless they existed before the time of Edward I., such an easement to a weir obstructing the fishery may be acquired in private waters by grant or prescription from the other riparian owners, or by enjoyment; in short, by any means by which such rights may be constituted.² It would seem that a claim to a weir is within the Prescription Act, and may be established by proof of enjoyment for the time required to confer easements with respect to water, and that the occasional interruption of the enjoyment of a weir so claimed by the owner of a mill on the banks of the river would not necessarily operate to destroy such a right. "We think," says Cockburn, C. J., "that there is nothing to prevent a second easement being acquired as subordinate to one already existing where the subject-matter admits of it. If the other riparian owners on the stream had granted to the appellant to have a weir for the purpose of taking fish at such times as the whole body of the stream was not needed for the working of the mill, such a grant would have been perfectly good, and would have conferred an easement *pro tanto*; we

Weirs in
private
waters.

¹ *Williams v. Wilcor*, 8 A. & E. 333; 7 L. J., Q. B. 229; 47 R. R. 595; per Lord Denman, C. J.; Hale de Jure Maris, c. 2. See *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

² *Rolls v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657; 39 L. J., C. P. 305; 23 L. T. 155; *Callis on Sewers*, p. 259; Coke, 2 Inst. p. 38; *Chester Mill case*, 10 Co. Rep. 138.

"see no reason why such a qualified easement should not be acquired by user for the time required to confer easements in respect of water."¹

Obstruction
of fishery
actionable.

The erection of a weir or other engine obstructing the passage of fish, though not a public nuisance and indictable, is, as has been said, an interference with the rights of the owners of other fisheries, and is as such *prima facie* actionable, as is also the enhancing and enlarging of existing weirs.²

Thus in the case of *Weld v. Hornby*,³ the converting of an ancient brushwood weir, through which fish could pass, into an impenetrable stone weir was held actionable at the suit of another owner prejudiced thereby. In this case the *locus in quo* was thought by Lord Ellenborough to be a navigable river, and he expressed an opinion that the weir was a public nuisance; this, however, turned out not to be the case, and is thus alluded to by Bovill, C. J., in *Leconfield v. Lonsdale*,⁴ "It was an action for a private nuisance, and unquestionably maintainable in respect of the plaintiff's right of property, which was injured by the act of the defendant in making his weir impervious to fish, and so preventing them from arriving at the plaintiff's fishery, a grievance long recognized as giving a right of action, independent of any question of public nuisance. See the precedent in the last case of year 46, *Lib. Assiz*." In fact, any unauthorized interference with the passage of fish up a river would appear to be actionable at the suit of the owner of a fishery who suffers damage thereby,⁵ and this principle possibly applies to a weir obstructing the passage of other fish than salmon, *e.g.*, trout.⁶

The pollution of the water of a stream, so as to render it unfit for fish to live in, is, moreover, actionable, and ground for the interference of the Court by injunction.⁷

Fishery in Lakes and Pools.

In ponds and
pools.

With regard to the law as to fishery in small ponds or pools, included in one property or manor, there can be no doubt that

¹ *Rolle v. Whyte*, L. R., 2 Q. B. at p. 302. See also per Bovill, C. J., in *Leconfield v. Lonsdale*, L. R., 5 C. P. 726.

² *Weld v. Hornby*, 7 East, 195.

³ *Ibid.*

⁴ L. R., 5 C. P. 725.

⁵ See *Marquis of Donegal v. Hamilton*, 3 Ridg., P. C. 267; *Murphy v. Ryan*, Ir. R., 2 C. L. 148; *Barker v. Faulkner*,

per Stirling, J., 79 L. T. 26.

⁶ *Barker v. Faulkner*, 79 L. T. 26.

⁷ *A.-G. v. Birmingham*, 4 K. & J. 528; *Bidder v. Croydon*, 6 L. T., N. S. 778; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Oldaker v. Hunt*, 6 D., M. & G. 376; *Aldred's case*, 9 Rep. 59 a; *Fitzgerald v. Firbank*, (1897) 2 Ch. 96; 76 L. T. 584. See *ante*, Chap. III. pp. 158 *et seq.*

the owner of the property or manor has *prima facie* the exclusive right to fish therein.¹ Where the boundary of two properties passes along the pool, it is taken to coincide with the *medium filum* of the pool, and the fishery will of course follow this boundary line.²

Though fish are animals *feræ naturæ*, which cannot be the subject of larceny at common law, it seems that fish in a small pond, tank, or stew in the owner's land, where they can be caught at pleasure, are more like chattels, and may be the subject of larceny; this seems to depend on the size of the pond, but no one has attempted to define how large the pond or lake must be, where larceny ends.³

With regard to the right of fishing in large navigable non-tidal lakes, the law does not appear to be so clearly settled. As has been said before, the public right of fishery cannot exist in non-tidal rivers where the presumption is that the respective owners on the banks are entitled to the exclusive fishery *ad medium filum aquæ*, though this presumption may be rebutted. In accordance with this principle, the Irish Court of Exchequer Chamber, in *Bloomfield v. Johnson*,⁴ has held, with some hesitation, affirming the judgment of the Court of Common Pleas, that there is no public right of fishery in large navigable and non-tidal lakes.

In large navigable lakes.

The same point was raised in a later case on demurrer, and the Irish Court of Exchequer held themselves bound by the prior decision of the Exchequer Chamber in *Bloomfield v. Johnson*, which they could not question. No appeal was brought from this judgment on the demurrer; but on an appeal to the Irish Exchequer Chamber, from an order of the Court making absolute a conditional order for a new trial, on the ground of mis-direction on other grounds, Whiteside, C. J., strongly expresses his dissent from the above principle.⁵ "If this vast sheet of water," he says, "be navigable and navigated for the convenience of the "surrounding inhabitants,—if the lake affords a common passage for public use,—if its navigation be watched over and

Bristowe v. Cormican.

¹ See Paterson, *Fishery Laws*, p. 2. As to this question between a lord and copyholder of a manor, see *Clarke v. Mercer*, 1 F. & F. 492.

² Phear's *Rights of Water*, p. 1; Woolrych on *Waters*, p. 121. See also per Lord Blackburn in *Bristowe v. Cormican*, 3 App. Cas. 665.

³ Paterson, p. 72; *Grey's case*, Ow. 20;

1 Hale, Pl. C. 510, 511; East, Pl. C. 610; *R. v. Hunston*; *Reg. v. Steer*, 6 Mod. 183.

⁴ Ir. R., 8 C. L. 68. See *ante*, pp. 348 *et seq.*, and as to the ownership of the bed of lakes, *ante*, Chap. II. pp. 105 *et seq.*

⁵ *Bristowe v. Cormican*, Ir. R., 10 C. L. 434.

“assisted by the grand juries of four surrounding counties, for the benefit of the subject,—why should not the right of fishing in this inland sea be enjoyed and exercised by the public, as well as the right of passage for trade, traffic and enjoyment, subject to the servitudes and prerogatives belonging to the king? The lake, answers the lawyer, to give the right of fishing to the public, should be navigable. It is navigable, answer the inhabitants of four counties. No, retorts the lawyer, navigable in fact is one thing, navigable in law is another. ‘Navigable,’ writes Lord Hale, ‘means tidal,’ and, unless the salt water flows and recedes, the lough is not legally navigable; and if the water be fresh, though as wide as three counties, and teeming with fish, the public cannot take one fish in the exercise of their industry in procuring sustenance for themselves and others; the liberty of fishing, which is of common right in the creeks and arms of the sea or navigable rivers, does not exist in vast sheets of water or inland seas, because the water is not salt—an arbitrary rule repugnant to reason, convenience, and the common sense of mankind. Inquisitive lawyers have raised the question, did Lord Hale really propound dogmatically that navigable in law meant tidal, not that it really was so? But the authorship is made a question in a note to *Calmady v. Rowe*.¹ It may be fairly said this question should now be thoroughly investigated on principle, and decided according to analogy and reason, by the ultimate Court of Appeal, by which tribunal alone it can be decided.”

The case went on appeal to the House of Lords; but as the question of the public right of fishing in the lake was not before the House, no decision on that point was given. Cairns, L. C., says,² “The defendants in the action, the respondents, had pleaded a special defence, alleging that Lough Neagh was a public or common navigable inland sea, and every subject of the realm had a right of fishing in it, and justifying their trespass under this right. To this special defence there was a replication, averring that the tides of the sea had never flowed in Lough Neagh, and to this replication there was a demurrer, which demurrer was overruled. Against the order overruling this demurrer the respondents have not appealed, and the appellants remain, therefore, the victors on that issue. My

¹ 6 C. B. 878.

² 3 App. Cas. 641, at p. 651.

“Lords, I mention this in order to show that it does not appear to me that your Lordships can decide, whether the replication to which I have referred was or was not a valid defence in law. That may be a fit question to raise in some other case; but it cannot for the reasons I have mentioned be raised in this case.”¹ Lord Blackburn in the same case seems to be clear that the Crown has no right to the soil or fishery in such lakes; but thinks it doubtful whether the rule, that each adjoining proprietor is entitled to the soil *usque ad medium filum aquæ* (and consequently to the fishing therein), applies to such lakes as Lough Neagh. After referring to certain dicta of Wightman, J., in *Marshall v. Ulleswater Co.*,² he continues, “This is the only case cited, and, as far as I can find, the only case which exists, where there is even a suggestion that the Crown of common right is entitled to the soil of lakes. Neither the passage in Comyns, nor that in Hale de Jure Maris, cited by Mr. J. Wightman, gives any countenance to such doctrine. But it did appear that the learned judge did not think the law as to land covered by still water was so clearly settled to be the same as the law as to land covered with running water, as to justify him in unnecessarily deciding that it was the same. More than this I think does not appear from that case. I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad medium filum aquæ* should apply to a lake, is a different question. It does not seem very convenient that such proprietor of a few acres, fronting on Lough Neagh, should have a piece of the soil of the lough many miles in length tacked on his frontage.”

In *Reg. v. Burrow*,³ a conviction by magistrates of defendant for fishing in Ulleswater was quashed by the Court, on the ground that a *bonâ fide* claim by defendant, as one of the public, to fish there, ousted their jurisdiction, the point not being so fully settled by authority as to make the claim one which could not exist at law.⁴

In *Pery v. Thornton*,⁵ the plaintiffs, owners of most of the

¹ See also per Lord Gordon, 3 App. Cas. at p. 671.

² 3 B. & S. 732; 41 L. J., Q. B. 41; 23 L. T. 793.

³ 34 Justice of Peace, 53.

⁴ See judgment of Cockburn, C. J., in this case, *ante*, p. 349.

⁵ 23 L. R., Ir. 402.

lands surrounding Lough Conn, a freshwater lake, eight miles long by one to four miles wide, were held entitled to an injunction to restrain the defendants, members of the public, from fishing in the lake with cross lines, a mode very destructive to fish, though the defendants pleaded that the lake was a public navigable lake, and gave some evidence that cross lines had been used on the lake for over twenty years.

In *Blower v. Ellis*,¹ B. was charged under 24 & 25 Vict. c. 96, s. 24 (Larceny Act, 1861), with unlawfully taking fish in a private fishery. The river was part of a Norfolk broad or lake, thirty-five miles from the sea. The evidence showed that the tide did not reach the spot, though occasionally the fresh water was backed up so as to rise three or four inches when there was a high tide. Anglers had been occasionally turned off if no consent of adjoining owners had been obtained. *Held*, that there was sufficient evidence to support the finding of justices that this was not a tidal navigable river where the public had a right to fish, but was a private fishery, and the conviction was held right.

In *Micklethwait v. Vincent*,² a landowner who claimed to be owner of part of one of the Norfolk broads brought an action for an injunction to restrain a person, claiming (*inter alia*) as one of the public, from shooting or fishing over the plaintiff's part of the broad, and from boating over such part, except within certain limits, comprising what was called the "channel." The defendant challenged the claim to ownership on various grounds, alleging (*inter alia*) that the broad was a tidal water, and therefore Crown property, and open to the public for all purposes. *Held*, upon the evidence, that the broad was not tidal; that the defendant's other contentions against the plaintiff's claim to the ownership and exclusive right of shooting and fishing failed, and that an injunction must be granted accordingly, but that the plaintiff had not made out his claim to restrict the public right-of-way and boating to the so-called "channel."

The right of fishery in canals and artificial watercourses is of course incident *primâ facie* to the ownership of the soil, as is the case in all other non-tidal waters, and it is clearly competent for the canal proprietors to let their right of fishery, if they should see fit.³ In many cases the right of fishery is regulated

Canals and
artificial
waters.

¹ 50 J. P. 326.

² (1892) 67 L. T. 225.

³ Woolrych on Waters, p. 65.

by the Act of Parliament creating the canal, and, in that case, will of course depend on the construction of the Act.

Thus, where a canal was made through a manor, and it was enacted by statute that the lord of the manor should have the fishing in so much of the canal, or cut, or reservior, as should be made in, over, or through the common or waste lands of the manor; and the owner of any other lands should have a like right of fishery in so much of the collateral cut as should be made in, over, or through his lands; it was held that the words "common or waste" meant those commonable lands of which the soil was in the lord, and not open fields where owners had rights of severalty, and that the lord had only the right of fishing in the canal or cut over his lands, and not in the reservoir.¹

Statutory Regulations affecting Fishery.

The statute laws relating to fishery, and framed for the protection of fish as a valuable source of food supply, are chiefly important as regulating the season during which fish may be caught, and the means which may be employed in catching them. In addition to this, the Larceny Act (24 & 25 Vict. c. 96) declares the law with regard to poaching fish. The importance of salmon, as an article of food, has occasioned the passing of numerous statutes for its protection.

General enactments for protection of fish.

Larceny Act.

By sect. 1 of 49 & 50 Vict. c. 39 (the Salmon and Freshwater Fisheries Act, 1886), which transfers to the Board of Trade the powers and duties previously exercised by the Home Office under the "Salmon and Freshwater Fishery Acts," the Act is to be construed as one with those Acts; and by sect. 7 and the Sched. of the Act they are declared to comprise: 24 & 25 Vict. c. 109 (the Salmon Fishery Act, 1861); 26 Vict. c. 10 (the Salmon Acts Amendment Act, 1863); 28 & 29 Vict. c. 121 (the Salmon Fishery Act, 1865); 33 & 34 Vict. c. 33 (the Salmon Acts Amendment Act, 1870); 36 & 37 Vict. c. 71 (the Salmon Fishery Act, 1873); 39 & 40 Vict. c. 19 (the Salmon Fishery Act, 1876); 39 & 40 Vict. c. 34 (the Elvers Fishery Act, 1876); 40 & 41 Vict. c. 65 (Fishery (Dynamite) Act, 1877); 40 & 41 Vict. c. 98 (Norfolk and Suffolk Fishery Act, 1877); 41 & 42 Vict. c. 39 (Freshwater Fisheries Act, 1878); 42 & 43 Vict. c. 26 (Salmon Fishery Law Amendment Act, 1879); 47 Vict. c. 11 (Freshwater

Salmon.

¹ *Grand Union Canal Co. v. Ashby*, 6 H. & N. 394; 30 L. J., Ex. 203; 3 L. T. 673. See also *Snape v. Dobbs*, 8 Moo. 23; 25 R. R. 616; Paterson, p. 66.

Fisheries Act, 1884); 49 *Vict. c. 2* (Freshwater Fisheries Act, 1886).¹

Freshwater
fish.

With regard to freshwater fish, except trout, char, eels, and lampreys in a salmon river, there were no restrictions whatever as to season or means of capture, until the passing of the Freshwater Fisheries Act, 1878 (41 & 42 *Vict. c. 39*), amended by the Freshwater Fishery Acts, 1884 and 1886 (47 *Vict. c. 11*, and 49 & 50 *Vict. c. 39*). With regard to sea fish, there are no statutory restrictions imposed on their capture, except by the conventions with France and certain other states confirmed by statute.

It is proposed to consider shortly the principal of these Acts, and then to treat more fully of the various restrictions imposed

¹ Neither the Freshwater Fisheries Act, 1878 (41 & 42 *Vict. c. 39*), nor the Freshwater Fisheries Act, 1884 (47 & 48 *Vict. c. 11*), apply to Ireland or to Scotland. 26 & 27 *Vict. c. 10* (Salmon), 33 & 34 *Vict. c. 33* (Salmon) apply to both Scotland and Ireland. 31 & 32 *Vict. c. 45* (Sea Fishery) applies to Ireland, and sects. 27, 67, 69 and 70 (Oysters) of the Act to Scotland. Sect. 13 of 54 & 55 *Vict. c. 37* (Legal Proceedings) applies to both Scotland and Ireland.

In addition to these statutes the fisheries of Scotland and Ireland are both governed by separate groups of Acts.

Scotland.

6 *Geo. I. c. 20*, s. 14 (*Fisheries Grant*); 13 *Geo. I. c. 26*, s. 18, and 13 *Geo. II. c. 30* (*Trustees of Grant*); 9 *Geo. II. c. 33*, s. 4 (*Lobsters*); 29 *Geo. II. c. 23* (*General*); 11 *Geo. III. c. 31*, ss. 11—13, 48 *Geo. III. c. 110*, 55 *Geo. III. c. 94*, 1 & 2 *Geo. IV. c. 79*, 11 *Geo. IV. & 1 Will. IV. c. 54*, 14 & 15 *Vict. c. 26*, 30 & 31 *Vict. c. 52*, 52 & 53 *Vict. c. 23*, 53 & 54 *Vict. c. 10*, 54 & 55 *Vict. c. 28* (*Herrings*); 5 *Geo. IV. c. 64*, ss. 9, 10, 57 & 58 *Vict. c. 14* (*Grant for the Erection of Piers*); 9 *Geo. IV. c. 39*, 7 & 8 *Vict. c. 95*, 25 & 26 *Vict. c. 97*, 26 & 27 *Vict. c. 10*, 26 & 27 *Vict. c. 50*, 27 & 28 *Vict. c. 118*, 28 & 29 *Vict. c. 121*, s. 63*, 31 & 32 *Vict. c. 123*, 33 & 34 *Vict. c. 33*, 36 & 37 *Vict. c. 71*, s. 12* (*Salmon*); 10 & 11 *Vict. c. 92* (*Mussels*); 8 & 9 *Vict. c. 26* (*Trout*); 27 & 28 *Vict. c. 33* (*Fish Trade*); 40 & 41 *Vict. c. 65* (*Dynamite*); 41 & 42 *Vict. c. 78*, s. 7 (*Employment of Children*); 44 & 45 *Vict. c. 11* (*Clam and Bait Beds*); 44 & 45 *Vict. c. 12*, s. 11 (*Customs*); 44 & 45 *Vict. c. 33*, s. 3 (*Summary Proceedings*); 45 & 46 *Vict.*

c. 78 (*Fishery Board Inspector*); 48 & 49 *Vict. c. 61*, s. 5, 50 & 51 *Vict. c. 52* (*Secretary for Scotland*); 48 & 49 *Vict. c. 70* (*Scottish Sea Fisheries*); and 58 & 59 *Vict. c. 42* (*Sea Fisheries Regulations*); 49 & 50 *Vict. c. 29*, s. 32 (*Crofting Parishes*); 59 & 60 *Vict. c. 42*, s. 3 (*Loans*); 61 & 62 *Vict. c. 56*, s. 23 (*Sea Fishery Grant*).

Ireland.

1 & 2 *Will. IV. c. 33*, s. 106 (*Public Works Commissioners*); 6 & 7 *Will. IV. c. 13*, s. 15 (*Constabulary*); 1 & 2 *Vict. c. 56*, s. 63 (*Rating*); 5 & 6 *Vict. c. 89*, s. 61 (*Drainage Commissioners*); 5 & 6 *Vict. c. 106*, 7 & 8 *Vict. c. 108*, 32 & 33 *Vict. c. 92* (*General*); 8 & 9 *Vict. c. 108*, ss. 2, 3, 7—15, 19, 23, 13 & 14 *Vict. c. 88* (*Oyster, Salmon and Trout*); 9 & 10 *Vict. c. 3* (*Fisheries, Piers and Harbours*); 9 & 10 *Vict. c. 86*, ss. 3, 4 (*Public Works Commissioners*); 11 & 12 *Vict. c. 92*, 26 & 27 *Vict. c. 114* (*Salmon and Trout*); 29 & 30 *Vict. c. 88*, 29 & 30 *Vict. c. 97*, 47 & 48 *Vict. c. 48* (*Oysters*); 32 & 33 *Vict. c. 9* (*Inspectors*); 37 & 38 *Vict. c. 86*, 45 & 46 *Vict. c. 16*, 54 & 55 *Vict. c. 48*, s. 35, 55 & 56 *Vict. c. 61*, s. 4 (*Advances and Gifts for Fisheries*); 40 & 41 *Vict. c. 56*, s. 74, 60 & 61 *Vict. c. 17* (*Appeals and Recognizances*); 44 & 45 *Vict. c. 12*, s. 11 (*Customs*); 44 & 45 *Vict. c. 49*, s. 5 (5) (*Rights of Fishing*); 44 & 45 *Vict. c. 66*, 54 & 55 *Vict. c. 20* (*Pollen*); 47 & 48 *Vict. c. 21* (*Sea and Coast Fisheries Fund*); 51 & 52 *Vict. c. 30* (*Trawling*); 1 *Edw. VII. c. 38* (1901) (*Steam Trawling*); 58 & 59 *Vict. c. 29* (*Salmon*); 61 & 62 *Vict. c. 28* (*Mussels, &c.*); 61 & 62 *Vict. c. 37*, s. 37 (*Local Government*); 62 & 63 *Vict. c. 50*, ss. 2 (1), 3, 6 (3), 15 (c), 16, 30, 34 (*Department of Agriculture*).

* These only apply to the Esk.

by them on—1st, the season, and, 2nd, the means, during and by which, the various fish protected may be caught. Finally, a sketch will be given of the law relating to the poaching of fish.¹

The fisheries² in certain seas outside the territorial waters are the subject of conventions between Great Britain and other nations, *e.g.*, the conventions made between Great Britain and the United States in 1818 and 1872 with regard to sea fisheries on the eastern coasts of British North America and the United States within certain limits; the conventions between Great Britain and France concerning the fisheries in the seas adjoining these countries, made in 1839 and 1867 (the latter of which is not yet, however, in force); the convention between Great Britain, Germany, Belgium, Denmark, France, and Holland, made in 1882, regarding the police of the fisheries in the North Sea outside territorial waters; the declaration respecting the North Sea fisheries made between Great Britain and Belgium, with the purpose of simplifying the settlement of differences between the fishermen of these countries outside territorial waters, in 1891; the convention made between the nations which were parties to the convention of 1882 respecting the liquor traffic in the North Sea, made in 1887; and the award of the tribunal of arbitration constituted under the treaty made in 1892 between Great Britain and the United States with respect to the fur seal fisheries in the Behring Sea, delivered in 1894. All the provisions of these conventions are respectively confirmed and sanctioned by statute, *viz.*, that of 1818 by 59 Geo. III. c. 38, and that of 1872 by 35 & 36 Vict. c. 45, that of 1839 by the Sea Fisheries Act of 1843 (6 & 7 Vict. c. 79),³ which is to be repealed

Foreign
conventions.

¹ There are various Local Fishery Acts in force (the provisions of which cannot be noticed here), *e.g.*, 18 Geo. III. c. 33, and 39 & 40 Vict. c. 34, as to fisheries in the Severn; 2 Geo. II. c. 19, 30 Geo. II. c. 21, and 31 & 32 Vict. c. 53, as to the Thames and Medway; and 40 & 41 Vict. c. 118, and 59 & 60 Vict. c. 18, as to Norfolk and Suffolk.

² Encyclopædia of Laws of England, p. 426.

³ By the 6 & 7 Vict. c. 79, the articles of a certain convention between her Majesty and the King of the French, concerning the fisheries in the seas between the British Islands and France, are declared to have the force of law. By these articles, all transgressions of the regulations are in both countries to be submitted to the ex-

clusive jurisdiction of the tribunal or magistrates designated by law who are to settle all differences and decide all contentions between fishermen of the two countries; and the trial and judgment is always to take place in a summary manner. This tribunal is also to have power to award damages for injuries over and above the penalties. By sect. 11 of the Act, all offences against the articles committed by British subjects are to be determined by justices of the peace, who are also declared to have the power of awarding compensation for injuries.

Held, that no action could be maintained for an injury caused by a breach of any of the regulations, as exclusive jurisdiction in such matters was given to the tribunal specified in the Act:

as soon as the convention of 1867 comes into force, and by 40 & 41 Vict. c. 42, s. 15 (Oyster, Crab, and Lobster Act, 1877), and 46 & 47 Vict. c. 22, ss. 24, 30; that of 1867 by 31 & 32 Vict. c. 45; that of 1882 by 46 & 47 Vict. c. 22; that of 1891 by 54 & 55 Vict. c. 37, and North Sea Fisheries Act of 1893 (56 Vict. c. 17); and that of 1892 by the Behring Sea Award Act of 1894 (57 & 58 Vict. c. 2).

**Sea Fisheries
Acts.**

By the Sea Fisheries Act, 1868, and the convention¹ thereto annexed, between her Majesty the Queen and the Emperor of the French, the fisheries in the seas adjoining the coasts of Great Britain and Ireland, and the coasts of France between Belgium and Spain, are regulated and protected. British fishermen are to enjoy the sole right of fishing within three miles of low water mark on the British coast; and French fishermen are to enjoy the sole right within three miles of the French coast, except as to that part of the coast of France between Cape Carteret and point Meinga. This distance of three miles with respect to bays, the mouths of which do not exceed ten miles in width, is to be measured from a straight line drawn from headland to headland; all fishermen are to be licensed, and their boats numbered;² and various articles regulate the respective rights of drift nets, and trawl fishing, and oyster fishing. The cruisers of either nation are to take cognizance of all infractions of the regulations, and all offenders requiring exemplary punishment are to be sent to their own country for trial. Fishing-boats of either country are to be admitted to sell their fish in such ports of the other country as are designated for that purpose. The fishing-boats of one country are not to enter the fishing limits of the other, unless by stress of weather, contrary winds, &c. Officers appointed by the Board of Trade and officers of the navy, coastguard, and consular officers, are given powers to board and examine boats, and take offenders without warrant before any justice of the peace. Persons obstructing the officers, or acting in contravention of the Act within the exclusive fishery limits of Great Britain on board a boat, either British or French, are deemed to have committed an offence against the Act.

Marshall v. Nickolls, 18 Q. B. 882; 21 L. J., Q. B. 343.

¹ This convention is, however, not yet in force; see St. R. & O. Revised, vol. iii. p. 238.

² Sects. 22—24 of 31 & 32 Vict. c. 45 as to the registry of sea fishing-boats

are repealed by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 745 and sched. 22, and sects. 25 and 71 and sched. 2 are wholly and sect. 58 partly repealed by 46 & 47 Vict. c. 22 (Sea Fisheries Act, 1883), ss. 8, 27, 30, and sched. 2.

The Act of 1883 (46 & 47 Vict. c. 22) contains similar provisions.¹ The Act of 1891 (54 & 55 Vict. c. 37) is merely supplemental to this Act. The Act of 1893 (56 Vict. c. 17) imposes penalties on any person on board or belonging to a British vessel, supplying, exchanging, or otherwise selling spirits to sea fishing-boats outside territorial limits in the North Sea, or any person in a British sea fishing-boat in that sea buying spirits, by exchange or otherwise, and selling to such boats provisions or other articles for use other than spirits, except in this last case that the seller have a licence from the Government according to the regulations in that respect made by Order in Council (sects. 2—5); for enforcing the Acts, British and foreign fishery officers have the same powers and protections as they have under the Act of 1883 (sect. 6).

By Part III. of the Act of 1868 it is provided, that the Board of Trade may make an order for the establishment or improvement of oyster² or mussel fisheries on the shore or bed of the sea, or of an estuary or tidal river, and after notice given and the inquiry and report of an inspector, may either confirm such order or not as seems fit.³ This part of the Act as to oysters is now extended to cockles by 47 & 48 Vict. c. 27 (the Sea Fisheries Act, 1884). No order is to be valid until confirmed by Act of Parliament. When such order has been confirmed, the grantee, subject to such restrictions as the order contains, is to have within the limits defined the sole right of depositing, fishing, dredging, &c. for oysters and mussels. Where an order has been made, only conferring a right to regulate such a fishery, and to levy tolls, &c., such order does not confer a right to the fishery,

Oyster
fisheries.

¹ The Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22) creates certain offences, and by s. 11 "The provisions of this Act . . . shall be enforced by sea fishery officers," who are defined by that section. *Held*, that the effect of the above words is that no one except a sea fishery officer can prosecute for an offence against the Act, and a rule calling upon justices to hear and determine a summons for an offence against the Act, taken out by a private individual, discharged: *Reg. v. Cubitt*, 22 Q. B. D. 622; 58 L. J., M. C. 132; 60 L. T. 638.

² It was intended that oyster fishing in beds between England and France outside the exclusive natural fishery limits should be regulated under the convention of 1867, and Part II. of the Act of 1868, but the convention has not come into force (see St. R. & O. Revised,

vol. iii. p. 238: cf. Encyc. Laws England, pp. 341, 342).

³ Where a municipal corporation has obtained an order from the Board of Trade conferring a right of regulating an oyster fishery under the Sea Fisheries Act, 1868, it may by virtue of sect. 41 of that Act lawfully take a lease of the foreshore of the fishery if the acquisition of the leasehold will enable it the better to carry out the purposes of the order: *Tenno Corporation v. Rowe*, (1901) 2 K. B. 870. As to the acquisition of private oyster fisheries by prescription, see *Goodman v. Mayor of Saltash*, 9 App. Cas. 37; *Mills v. Colchester*, L. R., 3 C. P. 575; 37 L. J., C. P. 278; 17 C. B., N. S. 635; *In re Free Fishers of Eversham*, 36 Ch. D. 328; and as to licences for reasonable fees, see *Mills v. Colchester Corporation*, *supra*.

but only to regulate it and take tolls. Any person fishing in such a fishery without paying the tolls granted, is liable, on summary conviction, to pay 20*l.* and to forfeit all oysters and mussels taken.¹ The portion of sea shore comprised in such an order is to be deemed to be within the adjoining county for purposes of jurisdiction; such grants are not to be made for longer than sixty years. No rights of several fishery are to be interfered with, and compensation is to be paid to owners of land taken. All oysters and mussels within such fishery, or in any several fishery enjoyed independent of the Act, are made the absolute property of the grantees or owners, and are to be deemed to be in their actual possession for all purposes, civil or criminal. Various restrictions, which will be noticed afterwards, are imposed on the season for, and mode of, taking oysters.

Sect. 5 of the *Oyster, Crab, and Lobster Act, 1877* (40 & 41 Vict. c. 42) empowers the Board of Trade, on local application, to temporarily prohibit or restrict dredging² for oysters on certain banks; but "nothing in such order shall apply to a several right of fishery in any oyster-bed or bank, or to any bed or bank of oysters which has been or shall hereafter be the subject of a grant or regulation order under Part III. of the *Sea Fisheries Act, 1868*, or any Acts amending the same." Sect. 4 of this Act prohibits, under penalties of a fine not exceeding 2*l.* for the first and 10*l.* for the second or any subsequent offence, the sale, or exposure, consignment, or buying for sale of any "deep sea oysters" between the 15th June in any year and the following 4th August, or any other description of oysters between 14th May and the following 4th August in any year. Persons acting in contravention of this provision are liable to forfeit all oysters exposed, consigned, or bought for sale. The Act does not apply to foreign oysters, even if stored in English waters till wanted for sale.³

¹ Sect. 58 as to appeals is in part repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), s. 4. The definition of "fishing-boat" given in sect. 5 of the Act is applied to fishing-boats in Scotland by the *Sea Fishery Boats (Scotland) Act, 1886* (49 & 50 Vict. c. 53), s. 2.

² Dredging for oyster spat in a common navigable river was illegal under 13 Ric. II. st. 1, c. 19; repealed by 24 & 25 Vict. c. 109, s. 39; *Maldon Corporation v. Wolret*, 4 P. & D. 26; 9 L. J., Q. B. 370. The 3 Jac. I. c. 12 (repealed by

24 & 25 Vict. c. 109), s. 39, which prohibited persons from "wilfully taking, destroying, or spoiling any spawn, fry, or brood, of any sea-fish in any weir or other engine or device, whatsoever," seemed not to comprehend shell-fish; and if it did, it meant a taking for destruction, and not a taking of oysters' spawn for the purpose of removing it to beds, for further growth and maturity, to make it marketable: *Bridger v. Richardson*, 2 M. & S. 568; 15 R. R. 355.

³ *Robertson v. Johnson*, (1893) 1 Q. B. 129.

The regulation of sea fisheries in British waters is further provided for by 51 & 52 Vict. c. 54 (the Sea Fisheries Act Regulation Act, 1888) which empowers the Board of Trade, upon the application of a county or a borough council, by order to create sea fishery districts¹ comprising any part of the sea within which British subjects have by international law the exclusive right of fishing, either with or without any part of the adjoining coast of England and Wales. The Board is to define the limits of the district and area chargeable with any expenses under the Act, and to provide for the constitution of a local committee for regulating the sea fisheries in such district. Any order which has been laid before both Houses of Parliament for thirty days comes into force at the expiration of that period, provided that no resolution to the contrary effect has been passed by either House. Committees may make bye-laws for regulating the fishery and impose penalties for the breach thereof, and appoint officers (who are empowered by justices' warrant to enter suspected places) to enforce them (sects. 2, 3, 6, 7),² but such bye-laws are not valid until confirmed by the Board of Trade (sect. 6). Sea fish is defined by sect. 14 not to include salmon as defined by any Act relating to salmon, but with this exception means "fish of all kinds found "in the sea, and shall also include lobsters, crabs, shrimps, "prawns, oysters, mussels, cockles, and other kinds of crustaceous "and shell fish." The relations of committees to conservators under the Salmon Acts and harbour commissioners are regulated by sect. 12; and rights of several fishery, or any right with regard to the sea shore under Act, charter, letters patent, prescription, or immemorial usage are protected by sect. 13. By sect. 7 of the Fisheries Act, 1891 (54 & 55 Vict. c. 37) (which is to be construed as one with the Act of 1888) the powers of local committees are extended to making bye-laws with respect to a close time for fish. The Act also gives summary jurisdiction over offences committed on the sea coast or at sea beyond the ordinary jurisdiction of a Court of summary jurisdiction (sect. 8); allows such a committee to enforce the Sea Fisheries Acts (sect. 9), and also a county or borough council to pay or contribute to the expenses of a board of salmon conservators under sect. 10 of the Act of 1888. The powers of committees

Sea Fisheries
Regulation
Act.

¹ As to measurement of the coast line in a fishery district, see *Tweed Commissioners v. Wood*, 46 J. P. 760.

² As to officers' expenses see *Reg. v.*

Yorkshire County Council, (1899) 1 Q. B. 201; 68 L. J., Q. B. 93; 79 L. T. 521; *Reg. v. Plymouth Corporation*, (1896) 1 Q. B. 158; 65 L. J., Q. B. 258.

Crabs and
lobsters.

are also extended to making bye-laws for regulating, protecting, and developing fisheries by sect. 1 of 57 & 58 *Vict. c. 26* (the *Sea Fisheries (Shell Fish) Regulation Act, 1894*).

By the *Fisheries (Oyster, Crab and Lobster) Act, 1877* (40 & 41 *Vict. c. 42*), which applies to all the British Islands, provision is made for the protection of crabs and lobsters. The Act forbids (sect. 8) taking, possessing, selling or exposing, consigning, or buying for sale edible crabs which (1) are less than $4\frac{1}{2}$ inches across the broadest part of the back, (2) are carrying spawn, (3) have recently cast their shell (sect. 8). The prohibition does not apply to the use of small edible crabs for bait. A like prohibition applies to the taking, &c., of lobsters less than 8 inches long (sect. 9). The penalties and forfeitures are enforceable under the *Summary Jurisdiction Acts* (sect. 11), and powers of search and seizure are given by sect. 12. The Board of Trade may also, after public inquiry held after due notice, prohibit or restrict the taking of crabs or lobsters in a particular area; but the order does not apply to a several right of fishery. The *Sea Fisheries Regulation Act, 1888* (51 & 52 *Vict. c. 54*), which provides for the creation of sea fishery districts and local committees, empowers a local committee to make bye-laws (sect. 2 (1) (e)) to prevent the use of undersized crabs for bait.

Under the *Fisheries Act, 1891* (54 & 55 *Vict. c. 37, s. 9*), local committees are empowered to enforce the provisions of the Act of 1877, including the power of search and seizure; and by the *Sea Fisheries Shell Fish Regulation Act, 1894* (57 & 58 *Vict. c. 26*) they are given extended powers of making bye-laws for the regulation, protection, and development of fisheries *inter alia* for crabs and lobsters.¹

Herrings.

Sects. 4 and 5 of 48 *Geo. III. c. 110* provide for the appointment of the Herring Fishery Commissioners, and the establishment of fishery districts, and the rules to be observed by fishermen and others are regulated by that Act, and a series of statutes amending it which are recited in the preamble to 14 & 15 *Vict. c. 26*.²

Ency. Laws of England, pp. 26, 27.

² These Acts are:—48 *Geo. III. c. 110*; 51 *Geo. III. c. 101*; 52 *Geo. III. c. 153*; 54 *Geo. III. c. 102*; 55 *Geo. III. c. 94*; 1 *Geo. IV. c. 103*; 1 & 2 *Geo. IV. c. 79*; 5 *Geo. IV. c. 64*; 7 *Geo. IV. c. 34*; 1 *Will. IV. c. 54*; 6 & 7 *Vict. c. 79*; 10 &

11 *Vict. c. 91*. Some of these Acts have been wholly and others partially repealed, and 14 & 15 *Vict. c. 26* has itself been partially amended by 30 & 31 *Vict. c. 52, s. 9, 31 & 32* *Vict. c. 45, s. 71*, and by the *Statute Law Revision Acts, 1875 and 1892*.

By the *Salmon Fishery Acts*, 1861 to 1886,¹ it is provided, that for the protection of salmon fisheries the justices of a county, at any Court of Quarter Sessions, may apply to the Board of Trade to form into a fishery district, or districts, all or any of the salmon rivers within their county. Where such district is formed, a board of conservators may be appointed by the Court of Quarter Sessions for enforcing the provisions of the Fishery Acts within their jurisdiction. Where a fishery district does not lie wholly within one county, a fishery committee of three members from each county are to appoint a board of conservators.²

Salmon Fishery Acts. Formation of conservancy districts and boards.

When the justices of any county in quarter sessions have applied to the Secretary of State to form into a fishery district any river lying wholly or partly in their county, the Secretary of State has jurisdiction by his certificate to enlarge the limits of the district to any extent, in the same and the neighbouring counties, that he in his discretion may think fit.³

All owners or occupiers of a fishery in such district, which is rated to the poor at the gross rental of 80*l.* per annum, and all owners of land in the district of the annual value of 100*l.*, having a frontage of not less than a mile on any salmon river, are to be *ex officio* members of the board;⁴ and in districts where there are any public fisheries, additional members may be elected by licensed fishermen fishing in the public waters.⁵

A fishery district may be altered, by including or excluding any salmon river or part of it, by certificate from the Secretary of State.⁶ The word "river" is defined as including "such portion of any stream or lake, with its tributaries, and such portion of any estuary, sea, or sea coast, as may from time to time be declared by the certificate of the Secretary of State to belong to such river."⁶ Where more than one river flows into an

¹ For list of these Acts, see *ante*, p. 377.

² Sect. 7. These provisions as to the formation, alteration, &c., of fishery districts, and appointment, &c., of conservators now apply to all waters frequented by freshwater fish: 41 & 42 Vict. c. 38, s. 6; 47 Vict. c. 11, s. 2.

³ *Reg. v. Grey*, L. R., 1 Q. B. 469; 6 B. & S. 65; 35 L. J., M. C. 198; 14 L. T. 477.

⁴ 36 & 37 Vict. c. 71, ss. 26, 29.

⁵ 28 & 29 Vict. c. 121, s. 20. As to rejecting a vote at election of Fishery Commissioners in Ireland, see *Beech v.*

Lucas, Ir. R., 11 C. L. 517.

⁶ Sects. 3, 5. As to meaning of "tributary," see *Evans v. Owen*, (1895) 1 Q. B. 237; 64 L. J., M. C. 59; 72 L. T. 54, where a brook running into a river which ran directly into the Severn was held to be a tributary of the Severn within the meaning of the certificate; *George v. Carpenter*, (1893) 1 Q. B. 505; 68 L. T. 714, where the Vyrnwy reservoir was held not to be a tributary of the Severn: *Harbottle v. Terry*, 10 Q. B. D. 131; 52 L. J., M. C. 31; 48 L. T. 219, where the Whittle Burn reservoirs were held to be tributaries of the Tyne. See

estuary, the Secretary of State may define the limits of such estuary, and form it into a separate district.¹

Proceedings
of board.

The proceedings of the boards of conservators are regulated by sects. 21 to 26 of 28 & 29 *Vict. c.* 101.

Powers of
boards.

The boards of conservators have powers within their districts to appoint water bailiffs (for which purpose they may obtain the services of additional constables under 3 & 4 *Vict. c.* 88, s. 19, with all the powers and privileges of water bailiffs); to issue licences for fishing with rods and nets, and for fishing weirs, mill-dams, &c.; to purchase compulsorily or otherwise,² for removal only, dams, fishing weirs, mill-dams, and fixed engines; to take proceedings against persons violating the Acts; and generally to do such acts as they may deem fit for the improvement of the fisheries: provided that nothing be done which may injuriously affect any navigable river, canal, or inland navigation.³

Weirs and
mill-dams
obstructing
fishery.

Proprietors of fisheries and boards of conservators can, with the consent of the Board of Trade, attach fish-passes, to be approved by the Board of Trade, to every dam existing at the passing of the Act of 1861, provided no injury is done to the milling power, or to the supply of water to or of any navigable river, canal, or other inland navigation. Compensation for damage done to a dam by erecting such fish-pass may be recovered from the person or body of persons by whom it is erected.⁴

Where new weirs or dams have been erected since the passing of the Act, or old ones raised, or altered, or rebuilt to the extent of one half the length of the weir or dam, or where any obstruction is caused to the passage of fish, the person causing the obstruction shall make a fish-pass to be approved by the Board of Trade.⁵

Bye-laws.

Further, conservators may make bye-laws⁶ to alter the limits of the annual and weekly close season within their district; to determine the length, size, and mesh of nets, and the mode of using them;⁶ to determine the form and rate of licences, and the

also *Merricks v. Cadwallader*, 51 L. J. M. C. 20; *Hall v. Reid*, 10 Q. B. D. 134, n.; 48 L. T. 221, n.

The meaning of "tributary" in all these cases is to be gathered from the wording of the special certificate in each case, and to include the tributaries of a tributary unless the wording of the certificates excludes such a construction

¹ 28 & 29 *Vict. c.* 121, s. 49.

² 36 & 37 *Vict. c.* 71, s. 49.

³ 28 & 29 *Vict. c.* 121, s. 27. For the Fishery Bye-Laws of the Thames Conservancy, see *post*, Appendix II.

⁴ 24 & 25 *Vict. c.* 109, s. 23.

⁵ *Ibid.* s. 25; 36 & 37 *Vict. c.* 71, s. 46.

⁶ A bye-law making it unlawful for any person to use any net whatever inside the bar in any public water of a fishery district, except a trawl net, between the 1st December and the 30th April, both inclusive, was held

marks attached to licensed nets or boats ; to prohibit the use of nets within certain distance of any river, not being a several fishery, and to determine when the gaff may be used ; to regulate the gratings to be placed in artificial channels ; to regulate the use of nets for fish other than salmon, prejudicial to salmon fishery, during the annual and weekly close seasons ; to prohibit the use in any inland water of any net except a landing-net, or a net for taking eels, between the first hour after sunset and the last hour before sunrise. They are also empowered to alter the close season for trout,¹ and char,² in their district. They may impose penalties not exceeding 5*l.* for each offence against the bye-laws ;³ all such bye-laws must be confirmed by the Secretary of State before coming into operation.⁴

Any water bailiff may examine any weir, fixed engine or obstruction, or any artificial watercourse connected with a salmon river ; stop and search⁵ any boat which he has reasonable cause to suspect contains salmon, and seize any fish or fishing instrument, &c., forfeited under the Acts ; search and examine any nets used by persons whom he has reasonable cause to suspect of having possession of fish illegally caught, and seize the fish. All persons resisting or obstructing such search to be liable to a penalty of 5*l.* ; for the enforcement of the Act all water bailiffs to have the powers of constables ; and the production of the instrument of their appointment to be their warrant.⁶ A water bailiff may, moreover, under special order of the Board, enter on any lands, at reasonable times, to prevent breaches of the Salmon Fishery Acts ;⁷ and may, together with any assistants, apprehend any person illegally taking salmon, or

Powers of
water bailiffs.

to be *ultra vires* and invalid ; as the conservators had no power under sub-sect. 11 of sect. 39 of the Salmon Fishery Act, 1873, to make a bye-law which was not a mere regulation, but an absolute prohibition for a definite time, of the use of nets which were found as a fact to be not prejudicial to the salmon fishery : *Puller v. Berry*, 59 L. T. 230 : 53 J. P. 6. See also *Wood v. Venton*, 54 J. P. 662.

¹ 39 & 40 Vict. c. 19, s. 4.

² 41 & 42 Vict. c. 39, s. 10.

³ 36 & 37 Vict. c. 71, s. 49.

⁴ *Ibid.* sect. 41.

⁵ As to right of search under the Tweed Fishery Act, 1857, 20 & 21 Vict. c. 148, s. 37, see *Jackson v. Stenerson*, 24 Sess. Cas. (1897).

⁶ *Ibid.* sect. 36. A water bailiff must

produce his appointment before exercising the authority given to him under the Salmon Fishery Acts, 1861 to 1873, whether such production be demanded or not : *Pernacott* or *Parnacott v. Passmore*, 56 L. J., M. C. 99 ; 19 Q. B. D. 75 ; 35 W. R. 812 ; 51 J. P. 821.

C., a water bailiff, went to search the boat of J., and told him that he (C.) had his warrant of appointment in his hand, and offered it to be read, but, it being dark, J. said he could not read it.

Held, the justices were wrong in refusing to convict J. for resisting C. on the ground that C. had not produced his appointment pursuant to 36 & 37 Vict. c. 71, s. 36 : *Cowler v. Jones*, 54 J. P. 660.

⁷ *Ibid.* sect. 37.

found near a salmon river with the intent to take salmon, between the first hour after sunset and the last hour before sunrise.¹

A justice may further, on information on oath that there is probable cause to suspect any breach of the Acts on any premises, by warrant, empower any inspector, water bailiff, conservator, constable, or police officer, to enter such premises, and seize any illegal engines or salmon illegally taken. No such warrant is to continue in force for more than one week.²

Gratings.

For the further protection of fish it is enacted, that where salmon are led aside out of a stream into any artificial channel for supplying towns with water, or for supplying a navigable canal, the persons having the control of such artificial channel, must put up and maintain gratings, to prevent the descent of salmon or young salmon, as approved by one of the inspectors of fisheries.³ A board of conservators may, moreover, order a grating to be placed at the expense of the board, in any water-course, mill-race, or leat, during such seasons of the year as may be prescribed,⁴ and may widen any channel so as to compensate for any diminution of any flow of water caused by the erection of the gratings;⁵ and may also, with consent of Secretary of State, adopt such measures as he may approve, for preventing ingress of salmon into streams unfitted for spawning,⁶ the owners of lands to preserve such gratings from injury.⁷

Inspectors and commis- sioners.

The general superintendence of the salmon fisheries in England is vested in the Board of Trade,⁸ which may appoint two inspectors of fisheries for three years. The inspectors are to make annual reports,⁹ containing a statistical account of all the salmon, freshwater, or sea fisheries as far as practicable, over which the Board of Trade have jurisdiction and control.¹⁰ Commissioners may be appointed by his Majesty to inquire into the legality of any fixed engines, and to abate and remove all such as are not proved to their satisfaction to be privileged, and to inquire into the legality of fishing weirs and fishing mill-dams, and to remove such fishing weirs, and cause to be incapable of catching fish such fishing mill-dams, as are in contravention of the Act.¹¹

¹ Ibid. sect. 38. The powers of water bailiffs are now extended to all waters containing "freshwater fish:" 47 & 48 Vict. c. 11, s. 3.

² 24 & 25 Vict. c. 109, s. 34.

³ Ibid. sect. 13.

⁴ 36 & 37 Vict. c. 71, s. 58.

⁵ Ibid. sect. 59.

⁶ Ibid. sect. 60.

⁷ Ibid. sect. 61.

⁸ 49 & 50 Vict. c. 39, s. 3.

⁹ 24 & 25 Vict. c. 109, ss. 31, 32.

¹⁰ 49 & 50 Vict. c. 39, s. 6.

¹¹ 28 & 29 Vict. c. 121, ss. 40, 42, 46, 55.

Certificates are to be given stating the situation, size, and description of engines proved to be privileged.¹

Notice is to be given in some daily London paper, and in some paper circulating in the district, of the place where and time when the commissioners will be prepared to hold a Court for determining the legality of fishing weirs, dams, and fixed engines in such district.² An appeal lies from the decision of commissioners, by special case, to any of the superior Courts of Westminster.³

By the *Freshwater Fisheries Act*, 1878, which is to be read as one with the *Salmon Fishery Acts*, 1861 to 1876, the provisions of the *Salmon Fishery Acts*, 1865 and 1873, which relate to the formation and regulation of conservancy districts, and the appointment and powers of conservators, are extended to all waters in England and Wales, except to the counties of Norfolk and Suffolk,⁴ and the city of Norwich, frequented by trout and char; and the term "salmon river" in the 4th and 19th sections of the Act of 1865, and in sect. 26 of the Act of 1873, are to mean any river frequented by salmon, trout, and char.⁵ In any district subject to a board of conservators, the provisions of the Acts of 1865 and 1873, relative to licences, are to be construed as if the words "trout and char" were inserted after the word "salmon";⁶ close seasons are instituted for trout, char, and freshwater fish, and the powers of water bailiffs under those Acts are to extend to all waters within the limits of the Act, as if the words "salmon rivers," wherever they occur, included all waters frequented by salmon, trout, and char.⁷ The provision of sect. 34 of the Act of 1861, as to search warrants, is to extend to all offences within the Act.

The Freshwater Fisheries Act, 1878.

By the *Freshwater Fisheries Act* (1884),⁸ fishery districts

¹ Ibid. sect. 41. The powers of appointing inspectors and commissioners is renewed every year by the *Expiring Laws Continuance Acts*.

² Ibid. sect. 43.

³ Ibid. sect. 45.

⁴ Extended to Norfolk and Suffolk by 47 Vict. c. 11, s. 8.

⁵ 41 & 42 Vict. c. 39, s. 6.

⁶ Ibid. sect. 7.

⁷ Ibid. sect. 8. Sect. 3 of 47 Vict. c. 11 is as follows: "In substitution for section eight of the *Freshwater Fisheries Act*, 1878, which shall be repealed, it is hereby enacted that section thirty-one of the *Salmon Fishery Act*, 1865, and sections thirty-six, thirty-seven, and

"thirty-eight of the *Salmon Fishery Act*, 1873 (which sections relate to the powers of water bailiffs), shall extend to all waters within the limits of this Act in like manner as if those sections were re-enacted in this Act, with the substitution of 'freshwater fish' for 'salmon,' and of 'waters frequented by freshwater fish' for 'salmon river,' and with a reference to the *Freshwater Fisheries Act*, 1878, and this Act, in substitution for the reference to the *Salmon Fishery Acts*, 1861 to 1873, or 'any of them.'"

⁸ 47 Vict. c. 11. The *Freshwater Fisheries Acts*, 1878 and 1884, apply to Ireland and Scotland.

may be formed and conservators appointed for water frequented by any freshwater fish and sect. 6 of the Freshwater Fisheries Act, 1878, is to apply as if "freshwater fish" were therein substituted for "trout and char" and "salmon trout and char," and sects. 27 and 31 of the Salmon Fishery Act, 1865, and sects. 36—38 of the Salmon Fishery Act, 1873, as to the powers of water bailiffs are to apply as if "freshwater fish" were therein substituted for "salmon," and "water frequented by freshwater fish" for "salmon river," and any conservators appointed are to have all the powers of conservators under the Salmon Fishery Act, 1876.¹ Conservators may make bye-laws as to the mesh, length, size, and description of nets and for prohibiting any mode of or instrument for catching freshwater fish, except fixed nets for eels and landing-nets. Bye-laws may be made and penalties imposed as under the Salmon Fishery Act, 1873.²

The Act is to be construed as one with the Freshwater Fisheries Act, 1878, and "Freshwater fish" is defined as "any fish living permanently or temporarily in fresh water, exclusive of salmon."³

Proceedings.

Proceedings against a person contravening any of the provisions of the Salmon and Freshwater Fishery Acts, 1861 to 1892, may be instituted before a Court of summary jurisdiction in any place in which the salmon, trout or char, in respect whereof the proceedings are taken, may be found, and any salmon, trout, or char which may be forfeited upon the conviction of an offender shall be disposed of as the Court directs.⁴

Legal proceedings for offences under the Acts may be taken by any member of the public (54 & 55 Vict. c. 37, s. 13); by

¹ Sects. 2, 3.

² Sect. 1.

³ Sect. 6. "The substance of the Freshwater Fisheries Acts, 1878, 1884, and 1886 (41 & 42 Vict. c. 39, 47 & 48 Vict. c. 11, and 49 & 50 Vict. c. 2), which extend to the whole of England, is that arrangements for the protection and management of freshwater fish are made similar to those relating to salmon; and a close time is instituted for all freshwater fish, during which time they may not be bought or sold or killed, with an exception in this last case of so doing by the owner of a several or private fishery, or by his permission in his private fishery, or by leave of a board of conservators in a public fishery, or by a person so doing for scientific purposes, or if they

"are taken for bait, under penalty of not more than 2*l.* fine on first conviction, 5*l.* on second or any subsequent conviction, and forfeiture of fish so caught, bought, or sold, and in the discretion of the justices, forfeiture of the instruments used in taking them" (1878 Act, s. 11); the use of poison or noxious substances for the destruction of fish is prohibited (1884 Act, s. 7); the Acts are applied to Norfolk and Suffolk (1884 Act, s. 8); and generally the provisions of the Salmon Fisheries Acts as to legal proceedings, offences, and penalties apply to those under the Freshwater Fisheries Act of 1878" (Encyclopædia of Laws of England, p. 365).

⁴ 55 & 56 Vict. c. 50. s. 4.

boards of conservators (24 & 25 *Vict. c.* 109, *s.* 27); or water bailiffs (54 & 55 *Vict. c.* 37, *s.* 18).¹ A conservator who has voted for a prosecution may not sit as a justice to determine it (28 & 29 *Vict. c.* 121, *s.* 65).² The proceedings may be instituted: wherever the salmon, trout, or char are found to which such proceedings relate (55 & 56 *Vict. c.* 50, *s.* 6); on either side of a river bounding two counties (24 & 25 *Vict. c.* 109, *s.* 36; 42 & 43 *Vict. c.* 49, *s.* 46); and where the offence is on the sea, in the adjoining county (24 & 25 *Vict. c.* 109, *s.* 37; 42 & 43 *Vict. c.* 49, *s.* 46; Summary Jurisdiction Act, 1878). Warrants may be issued by justices to search places in which offences are suspected to have been committed (24 & 25 *Vict. c.* 109, *s.* 34; 28 & 29 *Vict. c.* 121, *s.* 31). Increased penalties are incurred by persons twice convicted of certain offences under the Acts (28 & 29 *Vict. c.* 121, *ss.* 56, 59), which involve a right in the accused to elect for trial by jury (42 & 43 *Vict. c.* 49, *s.* 17; Summary Jurisdiction Act, 1878). Penalties imposed by the Acts are recoverable before a Court of summary jurisdiction, subject to an appeal to quarter sessions (28 & 29 *Vict. c.* 121, *s.* 66).³ The procedure on appeal is regulated by the Summary Jurisdiction Acts, 1879 (*s.* 31) and 1884. The parties may proceed by special case in lieu of appeal.⁴

On the high seas, as has been said, fish of all kinds may be taken, at all seasons, and by all means.⁵

The fishery for all kinds of fish in the territorial waters of the realm below low water mark, was, prior to the passing of the Sea Fisheries Regulation Act, 1888,⁶ free from legal restrictions as to season, with the exception of the coast of Cornwall east of Trevoze Head, where the use of drift or trawl nets is prohibited within two miles of low water mark, from sunrise to sunset, between July 25th and November 25th; it being also illegal during that season for any boat not engaged in seine fishing, to anchor or use any implement, except for the purpose of seine fishing, within half a mile of any sea boat engaged in seine fishing.

Statutory provisions as to the season during which it is illegal to catch fish. High seas. Territorial waters.

¹ *Pollock v. Moses*, 63 L. J., M. C. 116; 70 L. T. 378 (*Anderson v. Hamlin*, 28 Q. B. D. 221; 59 L. J., M. C. 151; 63 L. T. 168, over-ruled); *Williams v. Mackwall*, 32 L. J., Ex. 174; 8 L. T. 252.

² *R. v. Henley*, (1892) 1 Q. B. 504.

³ 51 & 52 *Vict. c.* 54.

⁴ *Garnett v. Backhouse*, L. R., 3 Q. B. 699. See *Encycl. Laws of England*, p. 364.

⁵ As to this, see article 10 of the convention attached to 31 & 32 *Vict. c.* 45.

⁶ 51 & 52 *Vict. c.* 54.

Now, by sect. 7 of the Fisheries Act of 1891, the powers of local committees under the Act of 1888 are extended to the making of bye-laws with respect to a close time for fish in sea fishery districts in any part of the sea within which British subjects have by international law the exclusive right of fishery,¹ either with or without any parts of the adjoining coast of England and Wales, and by the Shell Fish Regulation Act, 1894 (57 & 58 Vict. c. 26), these powers are extended to the making of bye-laws for the regulation, protection and the development of shell fish.

By sect. 1² (1) the bye-laws may provide for:—

- (a) fixing the sizes and condition at which shell fish may not be removed from a fishery and the mode of determining such sizes;
- (b) the obligation to re-deposit in specified localities any shell fish the removal or possession of which is prohibited by or in pursuance of any Act of Parliament;
- (c) the protection of shell fish laid down for breeding purposes;
- (d) the protection of culch and other material for the reception of spat, that is to say, of spawn or young of any kinds of shell fish; and
- (e) the obligation to re-deposit such culch and other material in specified localities.

Sect. 1 (2) empowers local fishery committees to stock or re-stock any public fishery for shell fish, and for that purpose to incur such expenses as may be sanctioned by the Board of Trade.

“Shell fish” is defined by sect. 1 (3) to include “all kinds of molluscs and crustaceans.”

Oysters.

By a convention between the British and French Governments incorporated into the Sea Fisheries Act, 1868, fishing for oysters in the Channel beyond three miles from the coasts of England and France, within a line drawn from North Foreland to Dunkirk, and a line drawn from the Land's End to Ushant, is prohibited from June 16th to August 31st; and during that time in the same part of the Channel, no boat may have on board any oyster dredge, unless the same be sealed up by the customs authorities, so as to prevent it being made use of. This convention is not yet in force³ and would appear to be binding only on the subjects of England and France, so far as it relates to the sea beyond the limits of the territorial waters of either country.

¹ As to these limits see *ante*, pp. 8, 12.

³ *Ante*, p. 380.

² 57 & 58 Vict. c. 26.

By the Fisheries (Oyster, Crab and Lobster) Act, 1877,¹ the Fisheries Act, 1891,² and the Sea Fisheries (Shell Fish) Regulation Act, 1894,³ penalties are imposed for the sale, exposure, consignment or buying for sale of any "deep sea oysters" between June 15th in any year and August 4th following, or of any other description of oysters between May 14th and August 4th following, provided that a person shall not be guilty of an offence if he satisfies the Court that the oysters were taken within the waters of some foreign state.⁴ Powers are given to local committees to make bye-laws for the regulation, protection and development of the fisheries, and the taking of undersized shell fish is prohibited.⁵

By sect. 19 of 31 & 32 Vict. c. 45, all restrictions whatever in England on the sale of sea fish (except salmon), which is not diseased, unsound, unwholesome, or unfit for the food of man, were abolished.

Other sea fish.

The restrictions on the sale of salmon during the close season, do not apply to fish caught beyond the limits of the Salmon Fishery Acts; and it seems somewhat doubtful whether the territorial waters within three miles of low water mark would be, according to the judgment in *Reg. v. Keyn*,⁶ so within the limits of the Act, as to make the possession of salmon caught out of season, within three miles of shore, illegal.

Salmon.

No salmon⁷ may be taken in any river (the term "river" including such portion of any stream or lake with its tributaries, and such portion of any estuary, sea, or sea coast as may be declared by the certificate of the Secretary of State to belong to such river)⁸ between 1st September and 1st February, or by putts and putchers between 1st September and 1st May in the ensuing year,⁹ both inclusive, under heavy penalties.¹⁰ If the river is in

Inland waters.
Salmon.

¹ 40 & 41 Vict. c. 42.

² 54 & 55 Vict. c. 37.

³ 57 & 58 Vict. c. 26.

⁴ This Act does not apply to foreign oysters, even if stored in English waters till wanted for sale: *Robertson v. Johnson*, (1893) 1 Q. B. 129.

⁵ The offence of removing undersized shell fish from a fishery, contrary to bye-laws framed under the Sea Fisheries (Shell Fish) Regulation Act, 1894, is complete whenever such shell fish have been taken up from any part of the fishery with the intention of eventually carrying them away: *Thomson v. Burns*, 66 L. J., Q. B. 176; 76 L. T. 58; 18 Cox. C. C. 491; 61 J. P. 84 (1896).

⁶ 2 Ex. Div. 68; 46 L. J., M. C. 17.

⁷ For definition of "salmon," see 24 &

25 Vict. c. 109, s. 4.

⁸ 28 & 29 Vict. c. 121, s. 3.

⁹ 42 & 43 Vict. c. 26.

¹⁰ 24 & 25 Vict. c. 109, s. 17. The time within which penalties may be recovered in a summary manner under sect. 62 of the Salmon Fishery Act, 1873, is to be calculated in accordance with the provisions of sect. 1 of the Summary Jurisdiction Act, 1848. It is therefore unnecessary that a conviction and recovery of a penalty should take place within six months from the actual date of the offence, so long as an information has been laid within six months: *Morris v. Duncan*, 68 L. J., Q. B. 69; (1899) 1 Q. B. 6; 79 L. T. 379; 47 W. R. 96; 62 J. P. 823—D.

a fishery district the board of conservators have powers to vary the close time.¹ Fishing for salmon with rod and line only may be lawfully carried on until the 1st November inclusive.² No person may take salmon except with rod and line during the weekly close season—i.e., from noon on Saturday till six on the following Monday morning.³ This time may be varied by the conservators of each district.¹

No person may, during the weekly close season, place any obstruction or do any act for the purpose of deterring salmon from passing up a river.⁴

Any person acting in contravention of these provisions is liable to forfeit all fish taken by him, and any net or movable instrument used by him in taking the same, and further to a penalty of 5*l.*, and 1*l.* for every fish so taken. A net so used for the purposes of taking salmon has been held to be forfeited, although the defendant who used it caught nothing.⁵

No person, whether the owner of a fishery or not, may take, buy, or sell or possess unclean or unseasonable salmon, unless such fish be taken accidentally or for scientific purposes;⁶ or take, destroy, buy, sell, or possess, obstruct, or injure the young of salmon,⁷ or disturb a spawning bed.⁸ All fixed engines must be removed during the annual close time within thirty-six hours of its commencement;⁹ and during the weekly close season a free passage must be left through cribs, boxes, and cruives.¹⁰

Trout, &c.

No trout or char may be taken in any river between October 1st and February 1st, both inclusive, under a penalty of 2*l.* for each

¹ 36 & 37 Vict. c. 71, s. 39.

² 24 & 25 Vict. c. 109, s. 17.

³ Ibid. sect. 21.

⁴ 36 & 37 Vict. c. 71, s. 16. A proprietor of salmon fishings in an estuary opposite his estate, restored the foreshore by an embankment sixteen inches higher than the original, which had been swept away by the tide, and this he did for the legitimate purpose of confining the river to its proper channel, and to protect his shore, and not as a device to obstruct or catch fish. The effect of thus raising the embankment was not to prevent or substantially impede the passage of salmon, although it did to some extent delay them and alter the course which they would take in ascending the estuary, and so facilitated their capture by the proprietor: *Held*, that the raising the

embankment was not an illegal obstruction within the meaning of the Salmon Fishery Acts: *Sutherland (Duke of) v. Ross*, 3 App. Cas. 736.

⁵ *Ruther v. Harris*, 1 Ex. Div. 97.

⁶ 24 & 25 Vict. c. 109, s. 14.

⁷ A., with a rod and line, caught a number of samlets (the young of salmon) whilst he was fishing for trout, not knowing the difference, and having no intention of taking or having in his possession samlets or the young of salmon, or the young of the salmon species: *Held*, that he had committed no offence under the statute: *Hopton v. Thirlwall*, 9 L. T. 327; 12 W. R. 72.

⁸ 24 & 25 Vict. c. 109, ss. 15, 16.

⁹ Ibid. sect. 20.

¹⁰ Ibid. sect. 22.

offence, and forfeiture of all fish taken.¹ A board of conservators has power, however, to vary the close time in its particular district.²

No person between January 1st and June 24th may fix in any salmon river—*i.e.*, in a river frequented by salmon or the young of salmon—any basket, net, trap, or device for taking eels or the fry of eels, or place in any inland water any device whatsoever to catch or obstruct any fish descending the stream.³

Eels, &c. in salmon river.

Fish descending stream.

No person shall place at any time upon the apron of any weir any basket, trap, or device for taking fish, except wheels or leaps for taking lamperns, between the 1st August and 1st of March.³

Lamperns.

No person may, between March 15th and June 15th, both inclusive, fish for, catch, or attempt to catch any fresh water fish—*i.e.*, any fish other than pollen, trout, and char, which live in fresh water, and do not migrate to the open sea.⁴

Freshwater fish other than trout or char.

Nothing in this section is to apply—(a) To the owner of any several or private fishery where trout, char, or grayling are specially preserved, destroying within such fishery any freshwater fish other than grayling; (b) To any person angling in any several fishery with leave of the owner, or in any public fishery under a board of conservators, with leave of the said board; (c) To any person taking fish for a scientific purpose, (d) or for bait, in any several fishery with the leave of the owner of such fishery, or in any public fishery except where such taking in a public fishery is prohibited by a bye-law of any conservators.⁵

A board of conservators, under the Acts of 1861 and 1876, may, however, as regards any or all kinds of freshwater fish, with the approval of the Secretary of State, exempt the whole or any part of their district from the operation of the foregoing provisions of the section.⁶

No person may buy, sell, or expose for sale, or have in his possession for sale, any salmon, or part of any salmon, between the 3rd September and 1st of February following, both inclusive,⁷ or any trout or char between 2nd October and the 1st of

Selling salmon, trout, or char in close season.

¹ 41 & 42 Vict. c. 39, s. 5; 28 & 29 Vict. c. 121, s. 64.

² 39 & 40 Vict. c. 19.

³ 36 & 37 Vict. c. 71, s. 15.

⁴ 41 & 42 Vict. c. 39, s. 11 (2).

⁵ 47 Vict. c. 11, s. 5.

⁶ 41 & 42 Vict. c. 39, s. 11.

⁷ 36 & 37 Vict. c. 71, s. 19; 24 & 25 Vict. c. 109, s. 21.

February following, both inclusive,¹ or any freshwater fish other than pollen, trout, and char, between 15th March and 15th June, both inclusive.² This does not apply to salmon cured beyond the limits of the United Kingdom, or within the limits of the United Kingdom between February 1st and November 3rd, or to any clean fresh salmon caught within the limits of the Act, provided its capture by any net, instrument, or device other than a rod and line was lawful at the time and in the place where it was caught; or to any clean fresh salmon caught beyond the limits of the Act, provided its capture by any net, instrument, or device other than a rod and line, if within the United Kingdom,³ was lawful at the time and place where it was caught. The burden of proof in all cases to be on the person selling.

No person shall between the 3rd September and the 1st February, both inclusive, consign or send by any common or other carrier any salmon, trout, or char unless the package containing it shall be conspicuously marked by painting or branding the word "salmon," "trout," or "char," respectively, on the outside; and customs officers, officers of conservancy boards, and officers of market authorities, acting within their respective areas, and also officers appointed by the Board of Trade and by the Fishmongers' Company may open suspected packages, and detain them when necessary. Persons offending against this section are made liable to a penalty not exceeding 5*l.*, and any unmarked package is forfeitable on the conviction of the offender.⁴

Taking unseasonable salmon, trout, and char.

No person may wilfully take, kill, or injure, or attempt to take, or buy or sell, or have in his possession, any unclean or unseasonable salmon, trout, or char.⁵

Statutory provisions as to the means by which it is illegal to catch fish.

There appear to be now no general⁶ legal restrictions on the means of catching sea fish, except salmon, in the sea or inland waters. The various statutes regulating the kinds of nets to be used, and the size of mesh allowable, have been repealed by the

¹ 36 & 37 Vict. c. 71, s. 20.

² 41 & 42 Vict. c. 39, s. 11 (4). The exposure of eels for sale during the close season, as limited by 41 & 42 Vict. c. 39, s. 11, sub-s. 2, was held to be an offence under sub-sect. 4 of that section, although they were caught in a part of the United Kingdom (Ireland) to which the Freshwater Fisheries Act, 1878, does not apply: *Bradley v. Price* or *Price v. Bradley*, 55 L. J., M. C. 53; 16 Q. B. D.

148; 53 L. T. 816; 50 J. P. 180—D.

³ See *ante*, p. 393.

⁴ 55 & 56 Vict. c. 50, s. 3.

⁵ 24 & 25 Vict. c. 109, s. 14; 36 & 37 Vict. c. 71, s. 18. As to measuring of unseasonable salmon, trout, char, &c., see *Okc's Fishery Laws*, 2nd ed. p. 41; *Bund's Law of Salmon Fisheries*, p. 336.

⁶ As to regulation of pilchard fisheries in the Bay of St. Ives, Cornwall, see 4 & 5 Vict. c. 57.

Sea Fisheries Act, 1868,¹ so far as relates to England ; ² and the *Freshwater Fisheries Act* expressly excludes all fish which migrate to the sea.³ In fishery districts under 51 & 52 *Vict. c. 54*, and 55 *Vict. c. 7*, and 57 & 58 *Vict. c. 26*, powers are given to local committees to make bye-laws for regulating fisheries.⁴ The only exception to this freedom of fishery is that contained in the *Fisheries (Dynamite) Act*, 1877,⁵ which prohibits the use of dynamite or other explosive substance for the catching or destruction of fish in any public fishery, and defines a public fishery as including the sea within a marine league of the coast.⁶

Sea fish other than salmon.

By the *Sea Fisheries Act*, 1868, it is made unlawful for any person, other than the owner or grantee of an oyster bed, or their servants, to fish there with any implement except a line and hook, adapted solely for catching floating fish, or so used as to disturb the oyster bed, or to dredge for or deposit ballast, or to place any instrument prejudicial to the oyster bed, except for a lawful purpose of navigation or anchorage, or to disturb in any other way such oyster bed, under penalties ; such person being at the same time liable to make compensation for all damage done, provided only that the oyster bed be properly marked out and known.⁷

Oysters.

With regard to salmon, the restrictions imposed by the *Salmon Fisheries Acts*, 1861—1886, appear only to apply to inland and tidal waters, as defined by the 24 & 25 *Vict. c. 109, s. 4*, including estuaries, and the sea shore to low water mark. By 41 & 42 *Vict. c. 39*, the provisions of the *Fisheries (Dynamite) Act* are extended to all private fisheries, and no person, even the owner, may use dynamite, or any other explosive substance to kill fish in the United Kingdom. No person may put any lime or other noxious material into any water frequented by freshwater fish with intent to destroy fish,⁸ or cause, or knowingly permit to flow or be put into any waters containing salmon, or into any

Salmon.

¹ 31 & 32 *Vict. c. 45*.

² As to Scotland, see Paterson's *Fishery Laws*, p. 165. As to Ireland, see Paterson's *Fishery Laws*, p. 247.

³ 41 & 42 *Vict. c. 39*.

⁴ See *ante*, p. 383. An otter trawl, which has no beam, but which is used in fishing for sea fish as a trawl with a beam, is within Bye-law 1 of the North-Eastern Sea Fisheries District Bye-laws, 1894, which prohibits the use of

any trawl or trawl net, or any net having a beam, and its use is contrary to that bye-law : *Colbeck v. Ashfield*, 67 L. J., Q. B. 333 ; 46 W. R. 302 ; 62 J. P. 214—D.

⁵ 40 & 41 *Vict. c. 65*.

⁶ *Ibid.* sect. 3.

⁷ 31 & 32 *Vict. c. 45*, ss. 53, 54. See 28 & 29 *Vict. c. 121*, ss. 3, 5.

⁸ 24 & 25 *Vict. c. 97*, s. 32 ; 47 *Vict. c. 11*, s. 7.

tributary thereof, any liquid or solid matter to such an extent as to poison or kill fish, unless in the exercise of any right to which he is by law entitled, in which case he is not to be liable to any penalty, if he prove to the satisfaction of the Court before whom he is tried that he has used the best practical means, within a reasonable cost, to render harmless the liquid or solid matter so permitted to flow or put into such waters.¹

No person may, in any non-tidal water, use any device to obstruct fish descending the stream² between January 1st and June 1st. No person may use, or have in his possession, any otter lath, jack, wire, or snare, light, spear gaff, strokeall, or snatch for taking salmon, or use for fishing, or have in his possession, any fish roe.³ No person may fish for salmon with a net having a mesh of less dimensions than two inches in extension from knot to knot,⁴ the measurement to be made on each side of the square, or eight inches measured round each mesh when wet; but the conservators of any district may, by bye-law, determine the length, size, and description of net to be used in their district.⁵

Licences.

No person may fish for salmon in any fishery, either with rod and line, or net, or weir, or fixed engine, without a proper licence.⁶

Licences shall be granted at fixed prices to all persons using any rod and line for fishing for salmon, and in respect of all fishing weirs, fishing mill-dams, putts, putchers, nets, or other instruments or devices, except rods and lines, whereby salmon are caught. 28 & 29 Vict. c. 121, s. 35 imposes a penalty on

¹ 24 & 25 Vict. c. 109, ss. 5, 6. See Rivers Pollution Act, 39 & 40 Vict. c. 75, *ante*, pp. 182 *et seq.*

² 36 & 37 Vict. c. 71, s. 15. In *Briggs v. Swanwick*, 10 Q. B. D. 510; 52 L. J., M. C. 63, a permanent structure for the purpose of catching eels erected before the passing of the Act was held to be within the section.

³ 24 & 25 Vict. c. 109, ss. 8, 9; 36 & 37 Vict. c. 71, s. 8. A net of such a description that the use thereof for catching salmon would constitute an offence under sect. 10 of the Salmon Fishery Act, 1861, is not within the meaning of sect. 8 of the same Act as amended by sect. 18 of the Salmon Fishery Act, 1873, so as to render any one found in possession of such a net with the evident intention of presently using it to catch salmon liable to a conviction under sect. 8 of the Act of 1861: *Jones v.*

Daries, 67 L. J., Q. B. 294; (1898) 1 Q. B. 405; 78 L. T. 44.

⁴ As to measurement of nets under stat. 1 Eliz. c. 17, s. 5, see *Thomas v. Evans*, 27 L. J., M. C. 172; *El., Bl. & El.* 171.

⁵ 24 & 25 Vict. c. 109, s. 10; 28 & 29 Vict. c. 121, s. 27.

⁶ 28 & 29 Vict. c. 121, ss. 33—37; 36 & 37 Vict. c. 71, s. 22. Fishing for bait with a rod and line without a licence with no intention of catching prohibited fish is not an offence under sect. 35 of 28 & 29 Vict. c. 121: *Marshall v. Richardson*, 58 L. J., M. C. 45; 60 L. T. 608.

A rod and line licence does not include the use of a night line: *Williams v. Long*, 57 J. P. 217; even if only set to catch eels, if such line be reasonably calculated to catch trout or char: *Hill v. George*, 44 J. P. 424. Where a scale of

fishing with rod and line without a licence. Sect. 36 subjects to a penalty "any person using any fishing weir, fishing mill-dam, "putt, putcher, net, or other instrument or device, not being "a rod and line, for catching salmon without a licence." The using a putt, though not with the intention of catching salmon, is within sect. 36, though the putt had at its mouth an iron grating which prevented salmon from getting in, but which could be removed at any minute.¹

No person may shoot or work any seine or draft net, reaching across the whole or two-thirds of the width of a river within 100 yards of another, until the first is drawn in.²

No person may use any fixed engine,³ dam or fishing weir for taking salmon, unless lawfully existing at the passing of the Act.⁴ No person may catch or kill, or attempt to catch or kill, except with rod and line, or scare, or disturb, or attempt to scare or disturb, any salmon within fifty yards above, or a hundred yards below, any weir or dam, or in any waters under, or appurtenant to, a mill, or in the head-race or tail-race of a mill, or in any waste race or pool communicating with the race, or in any artificial channel connected with such weir; and no person may fish with rod and line in such a manner, or in such a place, so as

Dams, fishing weirs, and fixed engines.

licence duties was one shilling "for each and every rod and line," it is an offence to fish with three rods and three lines: *Cambridge v. Harrison*, 64 L. J., M. C. 175; 72 L. T. 592.

A. and B. had each a licence for the use of a net, and on a certain day they and the two respondents were together using two coracle nets, each of which required the assistance of two persons. A. and B. were using one net, and the two respondents, who had no licence, were using another. The justices (upon an information against the two respondents) found that no fraud was intended, and as one of the licences would have conferred the right to the assistance of one of the respondents, and the two licences therefore would have protected all four of the parties, they dismissed the information: *Held*, that they were right. *Lewis v. Arthur*, 24 L. T. 66.

Sect. 22 of 36 & 37 Vict. c. 71, only applies to taking living fish and not to taking dead fish left on the tide retiring: *Gazard v. Cooke*, 55 J. P. 102; but to take dying trout by hand from a poisoned stream is an offence under sect. 22 as extended to trout and char by sect. 7 of 41 & 42 Vict. c. 39, and the offence is complete notwithstanding the

absence of evidence to connect the person so taking them with the poisoning of the stream: *Head v. Tillotson*, 69 L. J., Q. B. 260.

¹ *Lyne v. Leonard*, L. R., 3 Q. B. 156; 9 B. & S. 65.

² 36 & 37 Vict. c. 71, s. 14.

³ 24 & 25 Vict. c. 109, s. 11; 28 & 29 Vict. c. 121, s. 39. The right to take possession of or destroy any engine placed or used for catching salmon in contravention of that section extends to all persons and is not limited to conservators or overseers appointed under sect. 33: *Williams v. Blackwall*, 2 H. & C. 33; 32 L. J., Ex. 174; 9 Jur., N. S. 579; 8 L. T. 252; 11 W. R. 621 (1863).

⁴ 24 & 25 Vict. c. 109, ss. 12, 23, 27. The survey contemplated by the Irish Fishery Act, 5 & 6 Vict. c. 106, s. 63, is not a condition precedent to the maintenance of a prosecution for constructing a new weir across a salmon river in violation of the provisions of that section; but, as no penalty is attached, it is the subject of an indictment and not of a summary proceeding before a magistrate: *Kavanagh v. Glorney*, Ir. R., 10 C. L. 210.

unlawfully to scare or hinder salmon from passing through any fish-pass.

These restrictions do not apply to any legal mill-dam not having a crib box or cruive,¹ or to any box, coop, apparatus, or net, or mode of fishing in connection with, or forming part of, the weir, for purposes of fishing; or to a weir which has attached to it a fish-pass, approved of by the Home Office, through which there is a constant flow of water, such as will enable salmon to pass up and down it, until compensation for such right of fishery has been made by the conservators of the district to the owner of the fishery.² No ancient right or usage will justify fishing except with a rod within the prescribed distance of a dam in which there is no fish-pass.³

Fixed
engines.

No fixed engine of any description, including stake nets,⁴ bag nets, putts, putchers and nets fixed by anchor, or otherwise temporarily fixed to the soil, or other implement for taking fish, fixed to the soil, or made stationary in any other way, may be placed or used for catching salmon in any inland or tidal waters. These provisions are not to affect any ancient right or mode of fishing as *lawfully exercised* at the time of the passing of the Act, or during the five previous years—viz., 1857, 1858, 1859, 1860, 1861, by any person, by virtue of any grant or charter, or immemorial usage; but no person, by proving use of different engines during these years, will be allowed a number of privileged engines during these years, exceeding the greatest number in use during some one of the five years.⁵

With regard to the meaning of the words "*lawfully exercised*," the question of course will be different in navigable and non-navigable rivers. In navigable rivers all weirs and fixed engines

¹ As to width of cruives under the Salmon Fisheries (Scotland) Acts, see *Fife v. George*, 24 Court of Session Cas. 4th series, 549.

² 36 & 37 Vict. c. 71, s. 17; 24 & 25 Vict. c. 109, s. 12.

³ *Moulton v. Witby*, 8 L. T., N. S. 284; 9 Jur., N. S. 472.

⁴ On the hearing of a summons under 26 & 27 Vict. c. 114, s. 6, an Irish Fishery Act, against a person, not the owner of a several fishery in the whole of the river fished in, for wrongfully using a fixed net in a part of the river less than three-quarters of a mile wide, the justices are not concluded by the production of a certificate from the inspectors of fisheries, stating merely that the net was duly erected in

pursuance of the 5 & 6 Vict. c. 106. *Seemle*, such certificate ought to specify the grounds upon which it had been granted, and show jurisdiction upon the face of it: *Alexander v. Shiel*, Ir. R., 6 C. L. 510 (1872).

⁵ 24 & 25 Vict. c. 109, ss. 4, 11; 28 & 29 Vict. c. 121, s. 39. *A primâ facie* title to fish with bag nets, under the Irish Act, 26 & 27 Vict. c. 114, s. 4, must be shown to the inspectors of fisheries before they can be required to hold an inquiry as to the applicant's right to fish with bag nets; and unless such a title shall have been so shown, the Court will not grant a mandamus to compel the inspectors to hold such an inquiry: *Reg. v. Irish Fisheries Inspectors*, Ir. R., 10 C. L. 213.

for catching fish are illegal, unless proved to have existed prior to the reign of Edward I.;¹ whereas in non-navigable waters a right to erect such obstructions may be acquired by twenty years' uninterrupted enjoyment.²

In the case of *Holford v. George*,³ the owner of a several fishery in the navigable and tidal river Severn, claimed a right to use putchers and stop nets for the purpose of taking salmon, on the ground of immemorial user. He proved a user of forty-five years of some of the putchers, and of twenty years of the others; there was no evidence of previous user, nor was there any evidence to the contrary. The commissioners found the engines illegal. On a case stated for the Court of Queen's Bench, the Court held, that the user of forty-five years did not raise a conclusive presumption of law that the putchers and stop nets had been used from time immemorial, and were not of recent origin.

What evidence necessary to establish a claim to use fixed engines in a navigable river.

In the case of *Rawstorne v. Backhouse*,⁴ a claim was made by a lord of a manor to use reasonable fixed engines within the provisions of the Salmon Fishery Acts, 24 & 25 Vict. c. 109; 28 & 29 Vict. c. 121. He proved the existence of a fishery in that part of the river from the earliest times, and gave evidence that before 1844 fixed engines had been used in various hollows formed in the sands of the river; that in 1844 a wall was built under an Act of Parliament to improve the navigation of the river, and through the building of the wall the bed of the river was changed, and convenient hollows formed for placing the engines close to the wall. The engines claimed to be used were placed in these newly-formed hollows in 1844, and had been used there ever since. In a case stated by the commissioners for the opinion of the Court, whether they were bound, as a matter of law, to find that the claimant was entitled to use the fixed engines; the Court held that it was a mixed question of fact and law, whether the using of the engines in places since 1844, different from those in which they had been used previously, amounted to an enhancement of the engines, and that the commissioners were not bound, as a matter of law, to find that the claimant was so entitled. "If," says Bovill, C. J., delivering the judgment of the Court, "during all living memory

¹ See *ante*, p. 359.

² See *ante*, p. 371.

³ L. R., 3 Q. B. 639; 37 L. J., Q. B. 185; 18 L. T. 817; and see further as to

evidence necessary to support such a claim, *ante*, pp. 350 *et seq.*

⁴ L. R., 3 C. P. 67; 17 L. T. 441.

“the enjoyment of the right claimed had been uniform, and
 “unvarying, and consistent also with the ancient documents of
 “title, we think the commissioners would have been bound to
 “refer it to a legal origin, as by grant, charter, or immemorial
 “usage, if possible, and to have presumed that the three baulks
 “in question were legal and privileged engines within the
 “meaning of the Salmon Fisheries Act. The difference in the
 “situation of the baulks since 1844, however, at once introduces
 “a difficulty in the way of the appellant, which is of more
 “importance in these cases, because by the 41st section of the
 “Act of 1865, the commissioners are bound to fix the situation,
 “size and description of the engines which they are to certify as
 “privileged. The use of the engines in the particular situations,
 “where they have existed of late years, certainly could not be
 “carried back earlier than the year 1844, and this, under the
 “circumstances, would not be sufficient to found the presump-
 “tion of a right to have them at those particular places; and
 “if the right to have them in the situations where they existed
 “previously to 1844 was relied upon, the appellant was met by
 “the fact that they had not been so used in those places during
 “the open season of either of the five years, 1857 to 1861, as
 “required by the Act of 1865.

“In order to avoid these difficulties, the appellant’s counsel
 “was driven to contend that the appellant had proved a right to
 “have reasonable engines in reasonable places with reference to
 “the changing of the bed of the river, and that the commis-
 “sioners were bound to make a presumption, and to find
 “accordingly in favour of such right. The utmost extent, how-
 “ever, to which that argument could, in our opinion, prevail,
 “would be that the commissioners might be at liberty to
 “presume such a right in the terms in which it was contended
 “for by the appellant.”

What is a
 “fixed en-
 gine.”

A stop net has been held to be a fixed engine within the definitions in these Acts. A stop net is used as follows: The fisherman fixes his boat athwart the current of the river by lashing it at each end to a pole driven in the bed of the river. The net, which is thirty feet wide at the mouth, and tapers to a point, is stretched by two poles twenty-two feet long, which are tied together at the upper end and kept extended (to the width of the net at the mouth) by a pole lashed across at about seven feet from the upper end. The net is lowered overboard until the

two poles rest at about eight feet from the upper end on the side of the boat. The net and poles are thus nearly on a balance, and the fisherman presses slightly on the upper end and so keeps the net steady. At about an angle of twenty degrees he also holds a string attached to the bottom of the net, and when he feels the fish he presses down the upper ends of the poles with both hands, using the edge of the boat as a fulcrum, and so raises the net out of the water and catches the fish.¹

A net fixed to the bank by a stone, so as to give way on being touched by salmon and so entangle the fish, was held, in the case of *Thomas v. Jones*,² not to be a fixed engine within sect. 11 of 24 & 25 Vict. c. 109. To define with more certainty what the legislature meant by "fixed engine," sect. 39 of 28 & 29 Vict. c. 121 was passed; and under this section a net temporarily fixed to a pole driven into the soil at one end, half the net being stretched across the channel and anchored to a buoy, and the other half, when the opportunity arrived, being rowed round to the stake so as to sweep the river, was held a fixed engine.³

The mere using of a net fixed to the soil in tidal waters within the limits of a salmon fishery, but which net is not peculiarly an instrument for taking salmon, and is not fixed for that purpose, is not an offence within sect. 11 of 24 & 25 Vict. c. 109.⁴

No dam, except such fishing weirs and fishing mill-dams as were lawfully in use in the year 1861, by virtue of grant, charter, or immemorial user, may be used for catching or facilitating the catching of salmon, under a penalty of 5*l.* for each offence, and a further penalty of 1*l.* for each fish, and the forfeiture of all contrivances used, and of all salmon caught. No fishing weir extending more than half-way across any stream at the lowest state of the water, although lawfully in use, may be used for catching salmon, unless it has a free gap as regulated by the Act; and no fishing mill-dam may be so used unless it has attached to it a fish-pass as approved by the Home Office.

Privileged
weirs and
dams.

¹ *Gore v. Commissioners of Fisheries*, L. R., 6 Q. B. 561; 40 L. J., Q. B. 252; 24 L. T. 702.

² 5 B. & S. 916.

³ *Olding v. Wild*, 14 L. T., N. S. 402. The defendants were seen in salmon waters to tie one end of their trammel net to the bank, and the other end to the boat, and there leave it for fifteen minutes. The justices held it was a

fixed net, but dismissed the information for want of evidence as to ownership.

Held, that possession was good *prima facie* evidence of ownership, and that the justices were wrong in not convicting: *Vance v. Frost*, 58 J. P. 398. See *Reg. v. Pomfret*, 4 W. R. 267, as to fixed engines under 1 Geo. I. st. 2, c. 18, s. 14.

⁴ *Watts v. Lucas*, L. R., 6 Q. B. 226; 40 L. J., M. C. 73; 24 L. T. 128.

Any proprietor or board of conservators may, with the consent of the Home Office, attach to a mill-dam such a pass, provided no injury is done to the milling power.¹

A mill-dam built solely for milling purposes, and without any contrivances for catching fish, is not a fishing mill-dam within sect. 4 of 24 & 25 *Vict. c.* 109, although it does, in fact, render it more easy to catch fish, and such dam cannot be abated under sect. 42 of 28 & 29 *Vict. c.* 121; but any person so catching fish is liable to the penalty imposed by sect. 12 of 24 & 25 *Vict. c.* 109.²

It has been held in *Rolle v. Whyte*,³ that the provisions making fish-passes compulsory only relate to weirs reaching more than half-way across the stream, and that where there was a side stream fifteen feet wide, separated from the main stream by an island, this was not a stream within the Act so as to make a fish-pass compulsory in a dam reaching across the side stream.

Trout and
other fresh-
water fish.

The provisions of the Fisheries (Dynamite) Act now, by the Freshwater Fisheries Act, 1878,⁴ extend to all fish in the United Kingdom, as does the 15th section of 36 & 37 *Vict. c.* 71, which prohibits obstruction of fish descending the stream.⁵ The provisions of 24 & 25 *Vict. c.* 109, ss. 8 and 9, which prohibit the use of otter laths, spears, &c., and the possession and use of roe for fishing, are now, by the same Act, extended to trout and char within the limits of the Act.⁶ That Act also provides for the establishment of fishery districts on freshwater fish rivers;⁷ and in such fishery districts empowers conservators to issue licences for fishing for freshwater fish, and incorporates the sections of the Salmon Fishery Acts imposing penalties on persons fishing without licence.⁸ With these exceptions there seem to be no general restrictions as to the mesh of nets which may be used, or the size of fish that may be taken.

Poaching fish.

It has been already stated, that at common law, irrespective of statute, the stealing of fish in any small pond, tank, or stew, which is private property, and where the fish may be taken at will by the owner at any time, is larceny, and punishable on

¹ 24 & 25 *Vict. c.* 109, ss. 12, 23, 27.

² *Garnett v. Backhouse*, L. R., 3 Q. B. 30; 37 L. J., Q. B. 1; 17 L. T. 170. See *Rossiter v. Pike*, 4 Q. B. D. 24; 48 L. J., M. C. 81; 39 L. T. 496; *Pike v. Rossiter*, 37 L. T., N. S. 635; *Hodgson v. Little*, 14 C. B., N. S. 111; 32 L. J., M. C. 220; 16 C. B., N. S. 198; 33 L. J., M. C. 229.

³ L. R., 3 Q. B. 286.

⁴ 41 & 42 *Vict. c.* 39, s. 12. See *ante*, p. 397.

⁵ Sect. 5.

⁶ *Ibid.*

⁷ Sect. 6; 47 & 48 *Vict. c.* 11.

⁸ 41 & 42 *Vict. c.* 39, sect. 7.

indictment.¹ In addition to this, by the Larceny Consolidation Act² certain offences are created relating to the unlawful taking of fish in private fisheries. This statute enacts, that—Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining³ or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanour,⁴ punishable by the common law with fine and imprisonment in addition to or in lieu of sureties;⁵ and whosoever shall unlawfully or wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as herein-after mentioned, but which shall be private property, or in which there shall be any private right of fishery,⁶ shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money not exceeding 5*l.* as to the justice may seem meet: Provided that nothing hereinbefore contained shall extend to any persons angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset; but whosoever shall, by angling between the beginning of the last hour before sunrise and the expiration of the first hour after sunset, unlawfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, shall, on conviction before a justice of the peace, forfeit or pay any sum not exceeding 5*l.*, and if in any such water as last mentioned, he shall, on like conviction, forfeit and pay any sum not exceeding 2*l.* as to the justice may seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is in this section before mentioned, it shall be sufficient to prove that the offence was committed either in the parish, township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto.⁷

¹ See *ante*, p. 373.

² 24 & 25 Vict. c. 96. As to convictions for stealing fish and oysters under 7 & 8 Geo. IV. c. 29, s. 36, see *Thomas v. Russell*, 9 Ex. 764; 25 L. J., Ex. 233; *Hughes v. Buckland*, 15 M. & W. 345; 15 L. J., Ex. 233.

³ The meaning of the word adjoining is defined as "in actual contact, and not separated by a walk or fence." See *R. v. Hodges*, Moo. & M. 341; 53 R. 252.

⁴ Sect. 24.

⁵ Sect. 117.

⁶ The statute has been held to apply to persons illegally fishing in a several fishery, in tidal waters as well as in private waters: *Paley v. Birch*, 8 B. & S. 336. As to what is sufficient evidence of a private fishery, see *Greenback v. Saunderson*, 49 J. P. 40. A person who took or attempted to take "cray-fish" in a private fishery held not to be guilty of an offence under this section: *Caygill v. Thwaite*, 49 J. P. 616; 33 W. R. 581.

⁷ Sect. 24. The part of the shore between high and low water mark is

The word "unlawfully" in this section means without any claim of right or title in the offender, such as can exist in law :¹ and if such claim appears to the justices to be set up *bonâ fide*, and with some show of reason, their jurisdiction in the case is ousted ;² and a *certiorari* may be obtained to quash any conviction they may have made ;³ or the decision may be reviewed by a superior Court under 20 & 21 *Vict. c. 48*.⁴

An angler in the day-time, that is, between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset, cannot be arrested ; but a person angling at night, or fishing by other means than angling, may be arrested, and then without warrant by any person.⁵ The property in fish taken unlawfully vests in the taker unless they are taken from a tank or small pond, and the owner cannot recover them except in certain cases under the Salmon Acts, though he can their value.⁶ The tackle of persons found fishing against the provisions of the Act may be demanded, and, if refused, may be seized by the owner of the fishery, or his servant, or any person authorized by him. A person angling in the day-time from whom any implement shall have been taken, is exempted from any further fine.⁷ Sect. 92 of *The Malicious Damage Act*, 1861,⁸ enacts as follows : "Whosoever shall unlawfully and " maliciously cut through, break down, or otherwise destroy " the dam, flood gate, or sluice of any fish pond, or of any " water which shall be private property, or in which there shall " be any private right of fishery, with intent thereby to take " or destroy any of the fish in such pond or water, or so as " thereby to cause the loss or destruction of any of the fish, or " shall unlawfully and maliciously put any lime, or other noxious " material, in any such pond or water, with intent thereby to " destroy any of the fish that may then be, or that may thereafter " be put therein, or shall unlawfully and maliciously cut through, " break down, or otherwise destroy the dam or flood gate of

within the adjoining county ; and the justices of the county have jurisdiction over offences committed there, whether the land is covered or not with water : *Embleton v. Brown*, 30 L. T., N. S., M. C. 1 ; 3 E. & E. 234 ; *Reg. v. Musson*, 8 E. & B. 900 ; and see *ante*, Chap. I. p. 14.

¹ *Hudson v. McRae*, 5 B. & S. 485 ; 33 L. J., M. C. 65 ; *Hargreaves v. Diddams*, L. R., 10 Q. B. 482 ; 44 L. J., M. C. 78 ; 32 L. T. 600.

² *Reg. v. Peak*, 8 L. T., N. S. 536 ; *Leath v. Vine*, 30 L. J., N. S., M. C. 207 ; *Cornwell v. Saunders*, 32 L. J., M. C. 6 ; *Reg. v. Burrow*, 34 Justice of Peace, 53 ; *ante*, p. 349.

³ *Reg. v. Simson*, 4 B. & S. 301.

⁴ See *White v. Feast*, L. R., 7 Q. B. 353.

⁵ Sect. 103 (24 & 25 *Vict. c. 96*).

⁶ *Paterson, Fishery Laws*, 85, 86.

⁷ Sect. 25.

⁸ 24 & 25 *Vict. c. 97*.

“any mill pond, reservoir, or pool, shall be guilty of a misdemeanour; and being convicted thereof, shall be liable, at the discretion of the Court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping.” A person *bonâ fide* exercising his right of fishing who does damage to adjoining property is not liable criminally, though he may be civilly.¹

¹ 24 & 25 Vict. c. 97, s. 32.

CHAPTER VII.

OF NAVIGATION, AND THEREIN OF CONSERVANCY.

The Right of Navigation.

Definition.

THE right of navigation is a right of way exercised for the purposes of trade and commerce, which may be enjoyed in the sea, in public and in private waters; and as such it includes all rights necessary for the full enjoyment and exercise of the rights of convenient passage, and of commerce, such as the right to pass, and to ground, and to anchor, to remain for a reasonable time for the purposes of loading and unloading, or for a wind.¹

The consideration of this right involves not only the discussion of the nature of the right itself, but also that of the rules governing its exercise. These, in the case of the sea, embrace (in addition to the mere rules of the road) matters of considerable extent and importance, such as the seaworthiness of vessels, the liability of ship owners and the management of lighthouses, harbours, and ports, all of which are regulated by the merchant shipping laws, as well as the various questions arising in connection with the jurisdiction of the Court of Admiralty.²

It would be manifestly as impossible as inappropriate to attempt to treat this subject at all exhaustively in a work like the present; but as, on the other hand, the authors feel that it is equally unadvisable to omit all notice of it, they have endeavoured to give in the present chapter a brief general view of the law regarding navigation—

I. In the sea.

II. In inland waters.

¹ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266; *Mayor of Colchester v. Brooke*, 7 Q. B. 339; *Rex v. Russell*, 6 B. & C. 566; 30 R. R. 432; *Original Hartlepool Collieries v. Gibb*, 5 Ch. D. 713; *Dimes v. Petley*, 15 Q. B. 276; *Anon.*, Durham

Assizes, 1808, per Wood, B.

² The reader is referred for a full consideration of these subjects to Maude & Pollock's Law of Merchant Shipping; Williams & Bruce's Admiralty Practice; Boyd's Merchant Shipping Laws; and Abbott's Law of Merchant Ships and Seamen.

*In the Sea.*¹

The sea is the necessary highway of all nations² and the free navigation and commerce thereon is, therefore, the common right of all mankind.³

The sea is the highway of all nations.

The ships of all nations, whilst navigating the high seas,⁴ are subject only to the laws of their own country, and no one nation has the right to exercise civil or criminal jurisdiction over the ships of other nations during their passage between one foreign port and another.⁵ By 41 & 42 *Vict. c. 73*, foreigners on board foreign ships, passing within three nautical miles of the English coast, are made subject to English criminal law.⁶ The criminal jurisdiction over English ships on the high seas has, from the earliest times, been vested in the Court of Admiralty; and foreigners on board such ships are subject to English law.⁷ By 15 *Ric. II. c. 3*, it was provided, that the admiral should have no jurisdiction within the body of counties, either by land or sea, save for mayhem or murder done in estuaries and mouths of rivers, below the bridges where he should have a concurrent jurisdiction with the Courts of Common Law. This jurisdiction of the admiral was transferred to the Central Criminal Court by 4 & 5 *Will. IV. c. 36*, and further changes have been made in the present reign as to the civil jurisdiction of the Admiralty Courts, which are thus stated by Mr. Boyd in "The Merchant Shipping Laws":⁸—"By 3 & 4 *Vict. c. 65, s. 6*, jurisdiction was "given to the Admiralty Court to decide all claims and demands "whatsoever in the nature of damage received by any ship or "sea-going vessel, and to enforce the payment thereof, whether "such ship or vessel may have been within the body of a county, "or upon the high seas, at the time when the damage was "received, in respect of which such claim was made. And *The*

Jurisdiction over ships navigating.

¹ For the greater portion of this section, the authors have had recourse to Mr. A. C. Boyd's excellent work on *The Merchant Shipping Laws* (1876), to which the reader is referred for fuller particulars. Cf. also throughout Chap. I.

² Phillimore's *International Law*, vol. i. pp. 210, 211.

³ Wheaton's *International Law*, by Boyd, p. 251.

⁴ For definition of the high seas, and the limitations of territorial waters, see Chap. I. Territorial waters, as well as the high seas, are free to the peaceful navigation of foreign as well as English

ships; *The Saxon*, 1 Lush. 410; cf. Sir R. Phillimore, 2 Ex. D. 82.

⁵ *Reg. v. Kryn*, 2 Ex. D. 217, per Kelly, C. B.; *The Vigilantia*, 1 C. Rob. 1; *The Vron Anna Catherina*, 5 C. Rob. 161; *The Success*, 1 Dodd's Ad. 131.

⁶ See *ante*, Chap. I. p. 8; and the case of *Reg. v. Kryn*, *ante*, pp. 6—8.

⁷ *Reg. v. Sattler*, Dears. & B. Cr. C. 525; *Reg. v. Anderson*, L. R., 1 Cr. C. 161; *Reg. v. Lesley*, Bell, C. C. 220.

⁸ Page 262. See also for the origin and jurisdiction of the Admiralty Court, Williams' & Bruce's *Admiralty Practice*.

"*Admiralty Court Act, 1861* (24 Vict. c. 10, s. 7) enacts in general terms, that the Court shall have jurisdiction over any claim for damage done by any ship. The Court was therefore empowered to try any cause whatsoever, of such a description, even if all the parties to it were foreigners, and the cause of action arose out of the jurisdiction. However, in deciding causes of the latter kind, the Court must be guided by the rules of law to which both parties were subject when the damage was committed, and not by the Merchant Shipping Acts."¹

Pirates.

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, may be lawfully captured on the high sea by the armed vessels of any particular State, and brought within its territorial jurisdiction for trial at its tribunals.²

Tolls.

No tolls are demandable from vessels navigating the sea, save such as are chargeable for the formation of harbours, and the maintenance of buoys, lights, and beacons, which are a good consideration for a toll;³—"It being required," says Hale, "that any man who will prescribe for a toll on the sea must allege a good consideration."⁴ Hence no tolls can be taken for anchorage save in a port or harbour.⁵

The main ocean is incapable of being the property of any one State; but a nation may acquire exclusive right of navigation therein as against another nation by virtue of the specific provisions of a treaty,⁶ or by the tacit acquiescence of such other nation in its appropriation of certain portions for navigation.⁷ Similarly, though the soil of the bed of the sea cannot be the exclusive property of one nation, the beneficial occupation thereof for a sufficient time by any one nation may give a prescriptive right to such portion by the tacit consent of other nations; for the uninterrupted possession of territory or other property for a certain time by a State excludes the claim of every other.⁸ Also, when the sea or the bed thereof can be physically occupied

¹ "It is the general rule in construing Acts of Parliament, that the legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects, and not to affect the rights of foreigners, unless the contrary be expressed or implied from the absolute necessity of the case;" Boyd, *Merchant Shipping Laws*, p. 262.

² Wheaton, *International Law*, p. 168, and *ante*, Chap. I.

³ Hale de Portibus Maris, Harg. Tr. 51; *Gann v. Free Fishers of Whitstable*, 11 H. L. 193.

⁴ 1 Mod. 105.

⁵ *Gann v. Free Fishers of Whitstable*, *supra*. See on this subject, *ante*, Chap. I. pp. 53 *et seq.*, and *post*, Chap. IX.

⁶ Phillimore, *International Law*, vol. 1, pp. 210, 211.

⁷ Vattel, *Droit des Gens*, t. 1, c. xxiii.

⁸ Wheaton's *International Law*, by Boyd, p. 220.

permanently by erections, it may be the subject of occupation; and hence, piers, harbours and breakwaters become, in such cases, permissible, and, being for the benefit of navigation, are readily acquiesced in.¹

A harbour or haven is a place naturally or artificially made for the safe riding of ships.² A port is a haven, and something more,—it is a harbour where customs officers are established, and where goods are either imported or exported to foreign countries,³ and comprehends a city or borough, called *caput portus*, with a market and accommodation for sailors.⁴

Ports and
harbours.

In virtue of its prerogative, the Crown is conservator of all ports and havens, creeks and arms of the sea, and protector of the navigation thereof,⁵ and may grant to a subject the right to erect a port on his own land or on the land of another, provided, in the latter case, no vested interests are interfered with.⁶ The ports of this country are now, however, almost exclusively the property of corporate bodies by ancient grant or charter from the Crown, or by Act of Parliament, by which the powers and duties of the trustees and the public in each particular port are regulated. 10 & 11 Vict. c. 27 (*The Harbours, Docks, and Piers Clauses Act*, 1847), consolidated the provisions usually embodied in local Acts for the construction of harbours and piers; and by 24 & 25 Vict. c. 45, the Board of Trade may make provisional orders authorizing the erection of such works; while 25 & 26 Vict. c. 69 transferred to that body various duties and powers relative to harbours and navigation which were formerly vested in the Admiralty.

The Public Works Loan Commissioners are authorized by sect. 9, Schedule 1, of 38 & 39 Vict. c. 89,⁷ to make loans to any person authorized, for the purpose of the construction and improvement of docks, harbours, and piers, under *The Harbours and Passing Tolls Act*, 1861.⁸

By 40 & 41 Vict. c. 16,⁹ s. 4, harbour and conservancy authorities are empowered to remove vessels sunk, stranded, or

¹ Cockburn, C. J., *Reg. v. Keyn*, 2 Ex. D. 198.

² Hale de Portibus Maris, c. 2.

³ Houck's Navigable Rivers, p. 175.

⁴ Hale, c. 11. For the law relating to ports and harbours, see further *ante*, Chap. I.

⁵ Hale de Jure Maris, Harg. Tr. 23.

⁶ *Mayor of Exeter v. Warren*, 5 Q. B. 773.

⁷ The Public Works Loans Act.

⁸ 24 & 25 Vict. c. 47.

⁹ "An Act to facilitate the removal of Wrecks obstructing Navigation." By sect. 3, "'Harbour' includes harbours properly so called, whether 'natural or artificial, and estuaries, 'navigable rivers, piers, jetties, and 'other works, in or at which, ships can 'obtain shelter, or ship and unship 'goods or passengers; and 'tidal water' means any part of the sea and any

abandoned in tidal waters or harbours, where such wreck is or is likely to become an obstruction to navigation, or to destroy and, under certain conditions, to sell such wreck, and thereout defray expenses incurred under the Act. By sect. 5, similar powers are given to general lighthouse authorities. Where questions arise between these various authorities as to their powers under the Act, the Board of Trade is authorized to determine them (sect. 7).

The Merchant
Shipping
Acts.

The regulations respecting the ownership, measurement, and registry of British ships; the law governing the liability of shipowners, the relation between masters and seamen, and the procedure with regard to wrecks, casualties, and salvage; as well as the rules for preventing accidents in navigation, for the management of lighthouses, for the appointment and supervision of pilots, and for the administration of the Mercantile Marine Fund, are all under the direction of the Board of Trade, and are provided for by *The Merchant Shipping Act, 1894* (57 & 58 Vict. c. 60), which consolidates¹ the law on the subject and repeals all previous enactments. The Board of Trade is authorized to carry into execution the provisions of all Acts relating to merchant shipping and seamen, except where it is otherwise therein provided, or so far as the revenue is concerned (sect. 713). All consular officers and officers of customs abroad, and local marine boards and superintendents, must make and send to the Board any returns or reports on any matter relating to British merchant shipping or seamen required by it (sect. 714); and all superintendents when required by the Board must produce to it or its officers all official log-books and other documents delivered

Merchant
Shipping Act,
1894.

"part of a river within the ebb and
"flow of the tide at ordinary spring
"tides, and not being a harbour.

"*'Harbour authority'* includes all
"persons or bodies of persons, corporate
"or incorporate, being proprietors of or
"intrusted with the duty, or invested
"with the power of constructing, im-
"proving, managing, regulating, main-
"taining or lighting a harbour; and
"*'conservancy authority'* includes all
"persons or bodies of persons, corporate
"or unincorporate, intrusted with the
"duty and invested with the power of
"conserving, maintaining or improving
"the navigation of a tidal water; while
"*'general lighthouse authority'* has the
"same meaning as the term has in the
"*Merchant Shipping Act, 1854.*"

¹ The Act repeals thirty-three entire Acts and parts of fifteen others. It consists of 748 sections and 22 schedules,

and is divided into the following parts :
Part I., Registry of Ships; Part II.,
Master and Seamen; Part III., Passenger
and Emigrant; Part IV., Fishing Boats;
Part V., Safety; Part VI., Special
Shipping Inquiries and Courts; Part VII.,
Delivery of Goods; Part VIII., Liability
of Ship Owners; Part IX., Wreck and
Salvage; Part X., Pilotage; Part XI.,
Lighthouses; Part XII., Mercantile
Marine Fund; Part XIII., Legal Pro-
ceedings; Part XIV., Supplemental.
See for a full consideration of this
branch of the law, Maude & Pollock's
Laws of Shipping, 4th ed. (1881);
Williams' & Bruce's *Admiralty Practice*,
2nd ed. (1886); Kay's *Law relating to*
Shipmasters and Seamen, with supple-
ment comprising the *Merchant Shipping*
Act, 1894, 2nd ed., by Mansfield &
Duncan; and Scrutton's *Merchant*
Shipping Act, 1894, 2nd ed. (1895).

to them under the Act (sect. 715). Compliance with the provisions of the Act may be enforced by officers of the Board of Trade, commissioned officers of the Royal Navy on full pay, British consular officers, the Registrar-General of Shipping and Seamen and his assistant chief officers of customs, and superintendents who are given certain powers for the purpose (sect. 723).

The regulations for navigation on the high seas are contained in Part V., and by sect. 418 power is given to her Majesty upon the joint recommendation of the Admiralty and the Board of Trade, by Order in Council, to make regulations for preventing collisions. Such regulations are to apply to British ships everywhere, and to foreign ships when within British jurisdiction.

Regulations
for navigation,
sect. 25
of 25 & 26
Vict. c. 63.

By Order in Council of 27th November, 1896,¹ the regulations of 1884 (except article 10) were annulled as to British ships as from the 1st July, 1897, and the regulations of 1897 were substituted for them.

By sect. 424, her Majesty is empowered, with the consent of the foreign governments, to direct that the regulations shall apply to the ships of foreign countries, whether within British jurisdiction or not, and that such ships shall, for the purpose of the regulations, be treated as if they were British ships. By Orders in Council of 18th May and 7th July, 1897, these regulations have been applied to ships of the Argentine Republic, Austria, Hungary, Belgium, Brazil, Chili, China, Costa Rica, Guatemala, Italy, Japan, Mexico, Netherlands, Norway, Peru, Portugal, Russia, Siam, Spain, Sweden, United States, with a proviso that, in the case of China, they apply only to ships of war and merchant ships of foreign type.

In the case of collisions, it is provided by sect. 419 (4), that where it is proved to the Court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulations have been infringed shall be deemed to be in fault, until it is shown to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary.²

¹ The following are the Rules made by an Order in Council of November 27th, 1896 :—

SCHEDULE I.

Preliminary.

These Rules shall be followed by all vessels upon the high seas and in all

waters connected therewith, navigable by sea-going vessels.

In the following Rules every steam-vessel which is under sail and not under steam is to be considered a sailing-vessel, and every vessel under steam, whether under sail or not, is to be considered a steam-vessel.

² Cf. Marsden's "Collisions at Sea," 4th ed. 1897, pp. 366 *et seq.*

The word "steam-vessel" shall include any vessel propelled by machinery.

A vessel is "under way" within the meaning of these Rules when she is not at anchor, or made fast to the shore or aground.

Rules concerning Lights, &c.

The word "visible" in these Rules, when applied to lights, shall mean visible on a dark night with a clear atmosphere.

ARTICLE 1. The Rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

ART. 2. A steam-vessel when under way shall carry—

- (a) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than 20 feet, and if the breadth of the vessel exceeds 20 feet, then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40 feet, a bright white light, so constructed as to show an unbroken light over an arc of the horizon of 20 points of the compass, so fixed as to throw the light 10 points on each side of the vessel, viz., from right ahead to 2 points abaft the beam on either side, and of such a character as to be visible at a distance of at least 5 miles.
- (b) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least 2 miles.
- (c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of 10 points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least 2 miles.
- (d) The said green and red side-lights shall be fitted with inboard screens projecting at least 3 feet forward from the light, so as to

prevent these lights from being seen across the bow.

- (e) A steam-vessel when under way may carry an additional white light similar in construction to the light mentioned in sub-division (a). These two lights shall be so placed in line with the keel that one shall be at least 15 feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one. The vertical distance between these lights shall be less than the horizontal distance.

ART. 3. A steam-vessel when towing another vessel shall, in addition to her side-lights, carry two bright white lights in a vertical line one over the other, not less than 6 feet apart, and when towing more than one vessel, shall carry an additional bright white light 6 feet above or below such lights, if the length of the tow, measuring from the stern of the towing vessel to the stern of the last vessel towed, exceeds 600 feet. Each of these lights shall be of the same construction and character, and shall be carried in the same position as the white light mentioned in Article 2 (a), except the additional light, which may be carried at a height of not less than 14 feet above the hull.

Such steam-vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by, but such light shall not be visible forward of the beam.

ART. 4 (a). A vessel which from any accident is not under command, shall carry at the same height as the white light mentioned in Article 2 (a), where they can best be seen, and, if a steam-vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than 6 feet apart, and of such a character as to be visible all round the horizon at a distance of at least 2 miles; and shall by day carry in a vertical line one over the other, not less than 6 feet apart, where they can best be seen, two black balls or shapes, each 2 feet in diameter.

(b) A vessel employed in laying or in picking up a telegraph cable shall carry in the same position as the white light mentioned in Article 2 (a), and, if a steam-vessel, in lieu of that light, three lights in a vertical line one over the other, not less than 6 feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character as to be visible all round the horizon, at a distance of at least two

miles. By day she shall carry in a vertical line one over the other, not less than 6 feet apart, where they can best be seen, three shapes not less than 2 feet in diameter, of which the highest and lowest shall be globular in shape and red in colour, and the middle one diamond in shape and white.

(c) The vessels referred to in this Article, when not making way through the water, shall not carry the side-lights, but when making way shall carry them.

(d) The lights and shapes required to be shown by this Article are to be taken by other vessels as signals that the vessel showing them is not under command, and cannot therefore get out of the way.

These signals are not signals of vessels in distress and requiring assistance. Such signals are contained in Article 31.

ART. 5. A sailing-vessel under way, and any vessel being towed, shall carry the same lights as are prescribed by Article 2 for a steam-vessel under way, with the exception of the white lights mentioned therein, which they shall never carry.

ART. 6. Whenever, as in the case of small vessels under way during bad weather, the green and red side-lights cannot be fixed, these lights shall be kept at hand lighted and ready for use; and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision in such manner as to make them most visible, and so that the green light shall not be seen on the port side nor the red light on the starboard side, nor, if practicable, more than 2 points abaft the beam on their respective sides.

To make the use of these portable lights more certain and easy, the lanterns containing them shall each be painted outside with the colour of the light which they respectively contain, and shall be provided with proper screens.

ART. 7. Steam-vessels of less than 40, and vessels under oars or sails of less than 20, tons gross tonnage respectively, and rowing-boats, when under way, shall not be obliged to carry the lights mentioned in Article 2 (a) (b) and (c), but if they do not carry them they shall be provided with the following lights:—

1. Steam-vessels of less than 40 tons shall carry:

(a) In the fore part of the vessel, or on or in front of the funnel, where it can best be seen, and at

a height above the gunwale of not less than 9 feet, a bright white light constructed and fixed as prescribed in Article 2 (a), and of such a character as to be visible at a distance of at least 2 miles.

(b) Green and red side-lights constructed and fixed as prescribed in Article 2 (b) and (c), and of such a character as to be visible at a distance of at least one mile, or a combined lantern showing a green light and a red light from right ahead to two points abaft the beam on their respective sides. Such lantern shall be carried not less than 8 feet below the white light.

2. Small steamboats, such as are carried by sea-going vessels, may carry the white light at a less height than 9 feet above the gunwale, but it shall be carried above the combined lantern, mentioned in sub-division 1 (b).

3. Vessels under oars or sail, of less than twenty tons, shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

4. Rowing-boats, whether under oars or sail, shall have ready at hand a lantern showing a white light, which shall be temporarily exhibited in sufficient time to prevent collision.

The vessels referred to in this Article shall not be obliged to carry the lights prescribed by Article 4 (a), and Article 11, last paragraph.

ART. 8. Pilot-vessels, when engaged on their station on pilotage duty, shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes.

On the near approach of or to other vessels they shall have their side-lights lighted, ready for use, and shall flash or show them at short intervals, to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side.

A pilot-vessel of such a class as to be

obliged to go alongside of a vessel to put a pilot on board, may show tee white light instead of carrying it at the masthead, and may, instead of the coloured lights above mentioned, have at hand ready for use a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above.

Pilot-vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.

ART. 9.*

ART. 10. A vessel which is being overtaken by another shall show from her stern to such last-mentioned vessel a white light or a flare-up light.

The white light required to be shown by this Article may be fixed and carried in a lantern, but in such case the lantern shall be so constructed, fitted, and screened that it shall throw an unbroken light over an arc of the horizon of 12 points of the compass, viz., for 6 points from right aft on each side of the vessel, so as to be visible at a distance of at least one mile. Such light shall be carried as nearly as practicable on the same level as the side-lights.

ART. 11. A vessel under 150 feet in length, when at anchor, shall carry forward, where it can best be seen, but at a height not exceeding 20 feet above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile.

A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20, and not exceeding 40, feet above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall be not less than 15 feet lower than the forward light, another such light.

The length of a vessel shall be deemed to be the length appearing in her certificate of registry.

A vessel aground in or near a fairway shall carry the above light or lights and the 2 red lights prescribed by Article 4 (a).

ART. 12. Every vessel may, if necessary in order to attract attention, in addition to the lights which she is

by these Rules required to carry, show a flare-up light or use any detonating signal that cannot be mistaken for a distress signal.

ART. 13. Nothing in these Rules shall interfere with the operation of any special rules made by the Government of any nation with respect to additional station and signal lights for two or more ships of war or for vessels sailing under convoy, or with the exhibition of recognition signals adopted by ship-owners, which have been authorized by their respective Governments and duly registered and published.

ART. 14. A steam-vessel proceeding under sail only, but having her funnel up, shall carry in daytime, forward, where it can best be seen, one black ball or shape 2 feet in diameter.

Sound Signals for Fog, &c.

ART. 15. All signals prescribed by this Article for vessels under way shall be given :

1. By "steam-vessels" on the whistle or siren.

2. By "sailing-vessels and vessels "towed" on the fog-horn.

The words "prolonged blast" used in this Article shall mean a blast of from 4 to 6 seconds' duration.

A steam-vessel shall be provided with an efficient whistle or siren, sounded by steam or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient fog-horn, to be sounded by mechanical means, and also with an efficient bell.† A sailing-vessel of 20 tons gross tonnage or upwards shall be provided with a similar fog-horn and bell.

If fog, mist, falling snow, or heavy rain storms, whether by day or night, the signals described in this Article shall be used as follows ; viz. :—

(a) A steam-vessel having way upon her shall sound, at intervals of not more than 2 minutes, a prolonged blast.

(b) A steam-vessel under way, but stopped and having no way upon her, shall sound, at intervals of not more than 2 minutes, two prolonged blasts, with an interval of about 1 second between them.

(c) A sailing-vessel under way shall

* This Article will deal with regulations affecting fishing-boats, and will be the subject of another Order, which will be submitted to his Majesty for approval at a later date.

† In all cases where the Rules require a bell to be used a drum may be substituted on board Turkish vessels, or a gong where such articles are used on board small sea-going vessels.

sound, at intervals of not more than one minute, when on the star-board tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession.

(d) A vessel, when at anchor, shall, at intervals of not more than one minute, ring the bell rapidly for about five seconds.

(e) A vessel, when towing, a vessel employed in laying or in picking up a telegraph cable, and a vessel under way, which is unable to get out of the way of an approaching vessel through being not under command, or unable to manœuvre as required by these Rules, shall instead of the signals prescribed in sub-divisions (a) and (c) of this Article, at intervals of not more than two minutes, sound three blasts in succession, viz.: one prolonged blast followed by two short blasts. A vessel towed may give this signal, and she shall not give any other.

Sailing-vessels and boats of less than twenty tons gross tonnage shall not be obliged to give the above-mentioned signals, but if they do not, they shall make some other efficient sound-signal at intervals of not more than one minute.

Speed of Ships to be Moderate in Fog, &c.

ART. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

A steam-vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

STEERING AND SAILING RULES.

Preliminary.—Risk of Collision.

Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

ART. 17. When two sailing-vessels are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.:—

(a) A vessel which is running free

shall keep out of the way of a vessel which is close-hauled.

(b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.

(c) When both are running free, with the wind on different sides, the vessel which has the wind on the port side shall keep out of the way of the other.

(d) When both are running free, with the wind on the same side, the vessel which is to windward shall keep out of the way of the vessel which is to leeward.

(e) A vessel which has the wind aft shall keep out of the way of the other vessel.

ART. 18. When two steam-vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other.

This article only applies to cases where vessels are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two vessels which must, if both keep on their respective courses, pass clear of each other.

The only cases to which it does apply are, when each of the two vessels is end on, or nearly end on, to the other; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own; and by night, to cases in which each vessel is in such a position as to see both the side lights of the other.

It does not apply, by day, to cases in which a vessel sees another ahead crossing her own course; or by night, to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

ART. 19. When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

ART. 20. When a steam-vessel and a sailing-vessel are proceeding in such directions as to involve risk of collision,

the steam-vessel shall keep out of the way of the sailing-vessel.

ART. 21. Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision. (See Articles 27 and 29).

ART. 22. Every vessel which is directed by these Rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

ART. 23. Every steam-vessel which is directed by these Rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse.

ART. 24. Notwithstanding anything contained in these Rules, every vessel overtaking any other shall keep out of the way of the overtaken vessel.

Every vessel coming up with another vessel from any direction more than two points abaft her beam, *i.e.*, in such a position, with reference to the vessel which she is overtaking, that at night she would be unable to see either of that vessel's side lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these Rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel cannot always know with certainty whether she is forward of or abaft this direction from the other vessel, she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

ART. 25. In narrow channels every steam-vessel shall, when it is safe and practicable, keep to that side of the fairway or mid channel which lies on the starboard side of such vessel.

ART. 26. Sailing-vessels under way shall keep out of the way of sailing-vessels or boats fishing with nets, or lines, or trawls. This Rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing-vessels or boats.

ART. 27. In obeying and construing

these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above Rules necessary in order to avoid immediate danger.

Sound Signals for Vessels in Sight of One Another.

ART. 28. The words "short blast" used in this Article shall mean a blast of about one second's duration.

When vessels are in sight of one another, a steam-vessel under way, in taking any course authorised or required by these Rules, shall indicate that course by the following signals on her whistle or siren, *viz.* :—

One short blast to mean, "I am directing my course to starboard."

Two short blasts to mean, "I am directing my course to port."

Three short blasts to mean, "My engines are going full speed astern."

No Vessel under any Circumstances to neglect proper Precautions.

ART. 29. Nothing in these Rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Reservation of Rules for Harbours and Inland Navigation.

ART. 30. Nothing in these Rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbour, river, or inland waters.

SCHEDULE II.

Distress Signals.

ART. 31. When a vessel is in distress and requires assistance from other vessels or from the shore, the following shall be the signals to be used or displayed by her, either together or separately; *viz.* :—

In the daytime—

1. A gun or other explosive signal fired at intervals of about a minute;
2. The International Code signal of distress indicated by N.C.
3. The distant signal, consisting of a square flag, having either above or below it a ball or anything resembling a ball;

4. A continuous sounding with any fog-signal apparatus.

At night—

1. A gun or other explosive signal fired at intervals of about a minute;
2. Flames on the vessel (as from a burning tar-barrel, oil-barrel, &c.);
3. Rockets or shells, throwing stars of any colour or description, fired one at a time, at short intervals.
4. A continuous sounding with any fog-signal apparatus.

Lights for Fishing-boats under Order of Council of August 11th, 1884.

SCHEDULE referred to in this Order.

ART. 10. Open boats and fishing-vessels of less than 20 tons net registered tonnage, when under way and when not having their nets, trawls, dredges, or lines in the water shall not be obliged to carry the coloured side lights; but every such boat and vessel shall in lieu thereof have ready at hand a lantern with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.

The following portion of this Article applies only to fishing-vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre:

- (a) All fishing-vessels and fishing-boats of 20 tons net registered tonnage, or upwards, when under way and when not required by the following regulations in this Article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way.

- (b) All vessels when engaged in fishing with drift nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than 6 feet and not more than 10 feet; and so that the horizontal distance between them measured in a line with the keel of the vessel shall not be less than 5 feet and not more than 10 feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character,

and contained in lanterns of such construction as to show all round the horizon, on a dark night with a clear atmosphere, for a distance of not less than three miles.

- (c) A vessel employed in line fishing with her lines out shall carry the same lights as a vessel when engaged in fishing with drift nets.

- (d) If a vessel when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog-signal for a vessel at anchor.

- (e) Fishing-vessels and open boats may at any time use a flare-up in addition to the lights which they are by this Article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net shall be shown at the after part of the vessel, excepting that, if the vessel is hanging by the stern to her trawl, dredge, or drag net, they shall be exhibited from the bow.

- (f) Every fishing-vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least 1 mile.

- (g) In fog, mist, or falling snow, a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her fog-horn and ring her bell alternately.

Lights for Trawlers under Order of Council, December 30th, 1884.

Whereas by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 11th day of August, 1884, her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the 1st day of September, 1884, the Regulations in the Schedule thereto should, so far as regarded British ships and boats, be substituted for the Regulations for preventing collisions at sea contained in the First Schedule to an Order in Council made as aforesaid and dated the 14th day of August, 1879.

And whereas by the Regulations contained in the Schedule to the same Order in Council of the 11th day of August, 1884, it is provided as follows, viz. :—

ART. 3. A sea-going steamship when under way shall carry—

- (a) On or in front of the foremast, at a height above the hull of not less than 20 feet, and if the breadth of the ship exceeds 20 feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 5 miles.
- (b) On the starboard side, a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles.
- (c) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least 2 miles.
- (d) The said green and red side lights shall be fitted with inboard screens projecting at least 3 feet forward from the light, so as to prevent these lights from being seen across the bow.

ART. 6. A sailing ship under way, or being towed, shall carry the same lights as are provided by Article 3 for a steamship under way, with the exception of the white light, which she shall never carry.

ART. 10.

- (a) All fishing-vessels and fishing-boats of 20 tons net registered tonnage, or upwards, when under way and when not required by the following Regulations in this Article to carry and show the lights therein named, shall carry

and show the same lights as other vessels under way.

And whereas the Admiralty and the Board of Trade have, in pursuance of the said recited Act, jointly recommended to her Majesty that the Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August, 1884, shall as regards British fishing-vessels and boats when in the sea off the coast of Europe, lying north of Cape Finisterre, be modified and added to in manner following; that is to say,—

That as regards steam-vessels engaged in trawling, such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, should, if they do not carry the lights required by the said recited Article 3 of the Regulations aforesaid, be permitted to carry and show in lieu thereof and in substitution thereof, but not in addition thereto, whilst so engaged in trawling, and having their trawls in the water, and not being stationary as aforesaid, other lights of the description set forth in Part I. of the Schedule hereto; and that when under way, and not having their trawls in the water, they should carry and show the lights required by Article 3 above recited:

And that as regards sailing-vessels engaged in trawling, such vessels, if of 20 tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, should, if they do not carry the lights required by the said recited Article 6 of the Regulations aforesaid, be permitted to carry and show in lieu thereof and in substitution thereof, but not in addition thereto, whilst so engaged in trawling, and having their trawls in the water, and not being stationary as aforesaid, other lights of the description set forth in Part II. of the Schedule hereto; and that when under way, and not having their trawls in the water, they should carry and show the lights required by Article 6 above recited.

Now, therefore, her Majesty, by virtue of the powers vested in her by the said Act, and by and with the

advice of her Privy Council, is pleased to direct that on and after the first day of January, 1885, the Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August, 1884, shall, as regards British fishing-vessels and boats when in the sea off the coast of Europe, lying north of Cape Finisterre, be modified and added to as follows, viz. :—

As regards steam-vessels engaged in trawling when under steam, such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited Article 3 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part I. of the Schedule hereto ;

As regards sailing-vessels engaged in trawling, such vessels, if of 20 tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited Article 6 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part II. of the Schedule hereto.

The red and green lights, which are by this Order permitted as aforesaid to be carried in lieu of the lights required by Articles 3 and 6 of the said recited Regulations respectively, shall be of such a character as to be visible at a distance of not less than 2 miles on a dark night, with a clear atmosphere.

And her Majesty is pleased further to direct that steam-vessels of 20 tons gross register tonnage or upwards, and sailing-vessels of 20 tons net register tonnage or upwards, engaged in trawling, when under way between sunset and sunrise, but not having their trawls in the water, shall, if steam-ships, carry and show the lights required by Article 3 above recited, and if sailing-ships, shall carry and show the lights required by Article 6 above recited : Provided, however, that the modifica-

tions and additions set forth in Parts I., II., of the Schedule hereto shall not be applicable to the fishing vessels and boats of any foreign country, unless and until the same shall have been made applicable thereto by Order in Council.

SCHEDULE.

Part I.—Steam-Vessels.

(1) On or in front of the foremast head and in the same position as the white light which other steam-ships are required to carry, a lantern, showing a white light ahead, a green light on the starboard side, and a red light on the port side ; such lantern shall be so constructed, fitted, and arranged as to show an uniform and unbroken white light over an arc of the horizon of four points of the compass, an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass, and it shall be so fixed as to show the white light from right ahead to two points on the bow on each side of the ship, the green light from two points on the starboard bow to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side : and (2) a white light in a globular lantern of not less than 8 inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon ; the lantern containing such white light shall be carried lower than the lantern showing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than 6 feet nor more than 12 feet.

Part II.—Sailing-Vessels.

(1.) On or in front of the foremast head a lantern having a green glass on the starboard side and a red glass on the port side, so constructed, fitted, and arranged that the red and green do not converge, and so as to show an uniform and unbroken green light over an arc of the horizon of twelve points of the compass, and an uniform and unbroken red light over an arc of the horizon of twelve points of the compass, and it shall be so fixed as to show the green light from right ahead, to four points abaft the beam on the starboard side, and the red light from right ahead to four points abaft the beam on the port side : and (2) a white light in a globular lantern

Sect. 420 provides for the enforcement of the regulations by means of surveyors empowered to inspect vessels, and to point out to masters and owners any deficiencies, and the mode of meeting the same, and to grant certificates that vessels are properly pro-

of not less than 8 inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lantern containing such white light shall be carried lower than the lantern showing the green and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than 6 feet and not more than 12 feet.

Lights for Trawlers under Order of Council, June 24th, 1885.

Whereas by an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act, 1862, and dated the 30th day of December, 1884, her Majesty, on the joint recommendation of the Admiralty and the Board of Trade, was pleased to direct that on and after the first day of January, 1885, the Regulations contained in the Schedule to an Order in Council made as aforesaid, and dated the 11th day of August, 1884, should, as regards British fishing-vessels and boats, when in the sea off the coast of Europe lying north of Cape Finisterre, be modified and added to, *inter alia*, as follows, viz. :—

As regards sailing-vessels engaged in trawling, such vessels, if of 20 tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by Article 6 of the Regulations aforesaid, or shall carry and show in lieu thereof, and in substitution therefor, but not in addition thereto, other lights of the description set forth in Part II. of the Schedule to the said recited Order in Council of the 30th day of December, 1884.

And whereas the Admiralty and the Board of Trade have, in pursuance of the said recited Act, jointly recommended to her Majesty that the Regulations contained in the Schedule to the said recited Order in Council of the 11th day of August, 1884, shall, as regards sailing-vessels when engaged in trawling, be further modified and added to in manner following; that is to say,—

As regards sailing-vessels engaged in trawling, such vessels having their trawls in the water and not being stationary in consequence of their gear getting fast to a rock or other obstruction, if they do not carry and show the lights required by Article 6 of the Regulations aforesaid, or the other lights of the description set forth in Part II. of the Schedule to the said recited Order in Council of the 30th of December, 1884, shall carry and show in lieu of the lights required by Article 6 of the Regulations aforesaid, or the other lights of the description set forth in paragraph 2 of the Schedule to the said recited Order, other lights as follows; that is to say,—

A white light in a globular lantern of not less than 8 inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon, and visible on a dark night, with a clear atmosphere, for a distance of at least 2 miles; and also a sufficient supply of red pyrotechnic lights which shall each burn for at least thirty seconds, and shall, when so burning, be visible for the same distance under the same conditions as the white light. The white light shall be shown from sunset to sunrise, and one of the red pyrotechnic lights shall be shown on approaching, or on being approached by, another ship or vessel in sufficient time to prevent collision.

Now, therefore, her Majesty, by virtue of the powers vested in her by the said Act, and by and with the advice of her Privy Council, is pleased to direct that on and after the 24th day of June, 1885, the Regulations contained in the Schedule to the Order in Council of the 11th day of August, 1884, shall, as regards British sailing fishing-vessels and boats, when in the sea off the coast of Europe lying north of Cape Finisterre, be further modified and added to accordingly; that is to say, such sailing-vessels shall, whatever be their tonnage, be at liberty to carry the substituted lights hereinbefore described in lieu of, and in substitution for, but not in addition to, the lights prescribed to be carried by such sailing-vessels by the

vided with lights, and the means of making signals in pursuance of the regulations, it being enacted that no collectors of customs at any port shall clear any ship outwards without such certificate.¹

The law of pilotage is governed by Part X. of the Act, Pilotage.

Orders in Council dated respectively the 11th day of August, 1884, and the 30th day of December, 1884.

Lights for Steam Pilot Vessels under Order in Council of July 7th, 1897.

SCHEDULE.

A steam pilot vessel exclusively employed for the service of pilots licensed or certified by any pilotage authority or the committee of any pilotage district in the United Kingdom when engaged on her station on pilotage duty and in British waters and not at anchor shall in addition to the lights required for all pilot boats carry at a distance of 8 feet below her white masthead light a red light visible all round the horizon and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least 2 miles and also the coloured side-lights required to be carried by vessels when under way.

When engaged on her station on pilotage duty and in British waters and at anchor she shall carry in addition to the lights required for all pilot boats the red light above mentioned but not the coloured side-lights.

When not engaged on her station on pilotage duty she shall carry the same lights as other steam-vessels.

¹ It may be useful to note here some of the main points of the law on the duties of masters of vessels in case of collisions, as stated by Mr. Boyd (Merchant Shipping Laws, pp. 258, 262) :—

Collisions.—Ships are held liable for damage occasioned by collision, either on account of the culpable neglect or complicity, direct or indirect, of their owners, or on account of the negligence, unskilfulness or carelessness of those employed in their control and navigation. When employed in navigation ships must be kept seaworthy and be well manned and equipped for the voyage, and where this is not done and a collision ensues between such ship and one without fault in that respect, the owners of the deficient vessel cannot escape responsibility if the deficiency caused or contributed to the disaster (*The Continental*, 14 Wallace, Amer. Rep. 354; *The Glannabanta*, 1 P. D.

(C. A.) 291.)

"There are four possibilities," said Lord Stowell in *The Woodrop Sims* (2 Dods. Ad. 85), "under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or skill on both sides. In such a case the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only, and then the rule is that the sufferer must bear his own burden. Lastly, it may have been the fault of the ship which ran the other down, and in this case the injured party would be entitled to an entire compensation from the other."

The Court of Admiralty and the common law Courts used formerly to be guided by different rules for damages when both ships were in fault. But it is now enacted, that "in any case or proceeding for damages arising out of a collision between two ships, if both ships shall be found to be in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the Courts of common law, shall prevail" (The Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 25, sub-s. 9).

"Most countries," says Mr. Boyd (Merchant Shipping Laws, pp. 258—260), "possessing any considerable mercantile marine, have now adopted the same rules of navigation, and when the case is one within the rules there will be no difficulty in determining by what law it is to be decided. But it may happen that the case is one not contemplated in the rules, or that the foreign vessel is one not bound by them."

"The general rule respecting all remedies seems well settled 'that whatever relates to the remedy to be

sect. 578 of which defines pilotage authorities to include "all bodies and persons authorised to appoint or license pilots or to fix or alter rates of pilotage, or to exercise any jurisdiction in respect of pilotage"; but such authorities, which are entrusted with government of pilots, are themselves controlled by the Board of Trade as the supreme authority in all matters relating to merchant ships and seamen. Pilotage is compulsory for certain classes of ships in certain areas of the territorial

"enforced, must be determined by the
 "lex fori, the law of the country to the
 "tribunals of which the appeal is
 "made' (per Lord Brougham in *Don v.*
Lippmann, 5 Cl. & F. 13; 47 R. R. 1;
British Linen Co. v. Drummond, 10
 "B. & C. 903; 34 R. R. 595; *De la Vega*
v. Vianna, 1 B. & Ad. 284; 35 R. R.
 "298). But in regard to the rights
 "and merits involved in actions, the
 "law of the place where they originated
 "is to govern (Story, on the Conflict of
 "Laws, s. 588). 'The civil liability,'
 "said Willes, J., in a recent case
 "(*Phillips v. Eyre*, L. R., 6 Q. B. 28).
 "arising out of a wrong derives its
 "birth from the law of the place, and
 "its character is determined by that
 "law.' But in order that a wrong
 "committed abroad should give a
 "remedy in England, it is essential
 "that the wrong should be of such a
 "character, that it would have given
 "a cause of action if committed in
 "England (*The Halley*, L. R., 2 P. C.
 "194; *Smith v. Condry*, 1 Howard
 "(Amer. Rep.) 28). Lord J. Mellish
 "recently said, 'The law respecting
 "personal injuries and respecting
 "wrongs to personal property appears
 "to me to be perfectly settled, that no
 "action can be maintained in the
 "Courts of this country on account of a
 "wrongful act, either to a person or to
 "personal property committed within
 "the jurisdiction of a foreign country,
 "unless the act is wrongful by the law
 "of the country where it is committed,
 "and also wrongful by the law of this
 "country' (*The M. Morham*, 1 P. D.
 "(C. A.) 111; *Phillips v. Eyre*, L. R.,
 "6 Q. B. 28).

"Thus an English ship was compelled
 "to take a pilot on board off Flushing,
 "and through the negligence of the
 "pilot a collision occurred. By the
 "Belgian law the owners, though com-
 "pelled to employ a pilot, are liable for
 "his acts, whereas in England, when
 "pilotage is compulsory, the pilot alone
 "is responsible. In a cause of collision

"instituted against the British ship in
 "this country, it was held that the
 "party claiming reparation in a British
 "Court was not entitled to the benefit
 "of the foreign law that made the
 "owner responsible against the pro-
 "visions of English statute law, by
 "which no such liability as provided by
 "the Belgian law existed. An English
 "Court will not enforce a foreign
 "municipal law, and give a remedy in
 "the shape of damages in respect of
 "an act which, according to its own
 "principles, imposes no liability on the
 "person from whom the damages are
 "claimed (*The Halley*, L. R., 2 P. C.
 "194; *Smith v. Condry*, 1 Howard
 "(Amer. Rep. 28)). And on the other
 "hand, where a cause of damage was
 "instituted in this country against an
 "English ship for damaging a pier in
 "Spain, and it was alleged that by the
 "law of Spain the owner of the ship
 "was not responsible for such an act of
 "the master, it was held, that if the
 "owner was not responsible in Spain,
 "he could not be made so in England
 "even though he would have been liable
 "had the damage been committed in
 "England (*The M. Morham*, 1 P. D.
 "(C. A.) 107).

"The same principles apply to torts
 "committed on the high seas. No
 "liability will attach in this country
 "unless the act gives a remedy by
 "English law, and also by the laws of
 "the sea in force at the place where it
 "was committed (*Williams v. Gutch*
(The Chancellor), 14 Moo., P. C. 202).
 "When the case does not fall within
 "the rules, or the foreigner is not bound
 "by them, and the British ship is in the
 "wrong according to British law, but in
 "the right by the maritime law of the
 "locality, she will then be free from
 "liability, since, as the foreigner could
 "not himself be bound by British law,
 "he cannot avail himself of the fact
 "that the British ship has violated that
 "law (*The Zollverein*, Swa. 96; *The*
Saxonia, Lush. 410)."

waters of the United Kingdom, either by the general law contained in the Merchant Shipping Act, 1894, or by local laws and charters of certain ports which, with their exceptions, are saved by sect. 625 of the general Act; and this "compulsion" has been defined as "liability to pay pilotage dues as a penalty for refusing to take a pilot on board, though the same dues must be paid if a pilot is taken."¹ A "pilot" means "any person not belonging to a ship who has the conduct thereof" (sect. 742), and has also been defined as "a person who is taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port";² and by sect. 586 a pilot is to be deemed "qualified" for the purposes of the Act, if duly licensed by any pilotage authority to conduct ships to which he does not belong. In most ports of England societies and corporations have long been established, either by charter or local Act of Parliament, for the appointment and control of pilots in particular localities.³ Pilotage authorities in existence at the passing of the Act retain their powers and jurisdiction so far as they are not inconsistent therewith (sect. 574). When acting, a qualified pilot must be provided with his licence, which must be produced when required to his employer (sect. 588), or to the pilotage authority licensing him (sect. 589);⁴ and an unqualified pilot fraudulently using a licence is liable to a fine of 50*l.* (sect. 590). An unqualified pilot may, however, in any district, take charge of a ship without subjecting himself or his employer to any penalty:— (a) where no qualified pilot has offered or signalled to take charge of a ship; (b) where a ship is in distress, or circumstances where the master must take the best available assistance; or (c) for changing the moorings of any ship in port, or docking or undocking her, where this can be done without infringing port regulations or harbour-master's orders (sect. 596). By sect. 575 the Board of Trade is empowered by provisional order to constitute new pilotage authorities and to extend the limits of existing authorities, and in either case there shall be no compulsory pilotage, and no restriction on the power of duly qualified persons to obtain licences as pilots. The Board may also (by sect. 576) transfer pilotage jurisdiction over a port other

¹ *The Maria*, 1 Rob. W. 105. per Dr. Lushington.

² Abbott, 14th ed. 299.

³ Maude & Pollock, 250 and Ap-

pendix, where a list of such pilotage authorities is given.

⁴ Cf. *Henry v. Newcastle Trinity House Board*, 8 El. & Bl. 723.

than that where the pilotage authority for such port resides or has a place of business, from the pilotage authority to the harbour authority or other local body exercising local jurisdiction in maritime matters at that port, or to a new pilotage authority, or to the Trinity House, or it may transfer the whole or any part of the jurisdiction of a pilotage authority to a new authority. Pilotage authorities may by bye-law under the Act exempt any ships or classes of ships from compulsory pilotage, or annex terms and conditions to such exemptions, and revise and extend any such or already existing exemptions as they think fit (sect. 581).

The Trinity House.

The Trinity House is the chief pilotage authority, and its jurisdiction is defined by sect. 618 (1) to comprise:—(1) the London district, consisting of the waters of the Thames and Medway as high as London and Rochester Bridges respectively, and also the sea and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south; (2) the English Channel district, consisting of the seas between Dungeness and the Isle of Wight; and (3) the Trinity House outport districts, comprising any pilotage district for the appointment of pilots, within which no particular provision is made by any Act of Parliament or charter. “The Trinity House shall “not,” however, “license a pilot to conduct ships both above and “below Gravesend” (sect. 618 (2)). Subject to any alterations to be made by the Trinity House pilotage is compulsory within the London district and the Trinity House outport districts (sect. 622). Sect. 617 continues the powers conferred by previous Acts on the Trinity House of appointing sub-commissioners for the examination of pilots in all districts in which it had made such appointments prior to the passing of the Act; and sect. 632 contains similar provisions in favour of the Trinity Houses of Hull and Newcastle.

Lighthouses.

Part XI. of the Act relates to the management and construction of lighthouses, which are defined by sect. 742 as including, in addition to the ordinary meaning of the word, “any floating and “other light exhibited for the guidance of ships, and also any “sirens and other description of fog-signals, and also any “addition to a lighthouse of any improved light, or any siren or “any description of fog-signal.” The three general lighthouse authorities are the Trinity House, the Commissioners of Northern Lights, and the Commissioners of Irish Lights. The Trinity House is entrusted with the management and superintendence

of all lighthouses, beacons, and buoys, subject to the rights of the local lighthouse authorities, in England and Wales, the Channel Islands, and the adjacent seas and islands; but, except as to surrender and purchase of local lighthouses, beacons, and buoys, its powers as regards Guernsey and Jersey may be exercised only subject to the consent of his Majesty in Council, and dues may not be taken in the Channel Islands without the consent of the States of these islands (sect. 669). The Commissioners of Northern Lights have the same powers in Scotland and the adjacent seas and islands, and are a body corporate (sect. 668). In Ireland and the adjacent seas and islands the Commissioners of Irish Lights, incorporated by a local Act of 1867 (30 & 31 *Vict. c. lxxxi.*), exercise similar powers (sects. 634, 742).

The rights and obligations of passengers are set forth in Part III. of the Act, which is substituted for the Passengers Acts of 1855, 1870, and 1889, which are repealed by sect. 745 and sched. 22. "Passenger" is defined by sect. 267 to include "any person carried in a ship other than the master and crew, and the owner, his family and servants"; and "passenger steamer" means "every British steamship carrying passengers to, from, or between any places in the United Kingdom, except steam ferry boats working chains (commonly called steam bridges); and every foreign steamship carrying passengers between places in the United Kingdom."

Passengers.

Lifeboats are dealt with under Part V. (Safety).

Lifeboats.

"Lifeboat service" is defined by sect. 742 to mean "the saving or attempted saving of vessels, or of life or property on board vessels, wrecked or aground, or sunk, or in danger of being wrecked, or getting aground, or sinking"; and "any reference to failure to do any act or thing shall include a reference to refusal to do that act or thing." The Board of Trade is empowered by sect. 427 to make rules as to life-saving appliances (cf. sects. 428—431).

In Inland Waters.

The Merchant Shipping Act, 1894 (57 & 58 *Vict. c. 60*), s. 421 (1) provides that—any rules made before or after the passing of this Act under the authority of any local Act, concerning lights and signals to be carried, or the steps for avoiding collision to be taken, by vessels navigating the waters of any harbour, river,

Saving of
local rules of
navigation in
harbours, &c.

or other inland navigation, shall, notwithstanding anything in this Act, have full effect, and that where any such rules are not and cannot be made, his Majesty in Council on the application of any person having authority over such waters, or, if there is no such person, any person interested in the navigation thereof, may make such rules, and those rules shall, as regards vessels navigating the said waters, be of the same force as if they were part of the collision regulations.

This section is extended to and includes the power to make rules concerning lights and signals and collision regulations in the sea channels leading to the river Mersey (60 & 61 Vict. c. 21, s. 2).¹

¹ Art. 30 of the Regulations for preventing collisions at sea provides that :—

Nothing in these Rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river or inland waters.

Local rules have been made for the following places :—

Arundel (Port of), Avon (River), Belfast, Berkeley Canal, Blyth, Boston (Lincolnshire), Bridgewater Canal, Bristol Docks, Caledonian Canal, Carron (River), Clyde (Firth of and River), Cork, Cowes, Dartmouth, Dublin, Falmouth, Galway, Glasgow, Gloucester Canal, Holyhead, Humber, Ipswich, Limerick, Londonderry, Manchester and Salford Canals, Manchester Ship Canal, Medway, Mersey and Irwell Navigation, Newport (Mon.), Newry Navigation, Ouse (Lower and Upper), Runcorn and Weston Canal, Ryde, Solent Navigation, Southampton, Suir (River), Tees, Thames, Trent, Tyne, Warkworth Harbour, Waterford, Weaver Navigation, Youghal.

Rules have also been made for the dockyard ports of Portsmouth,* Plymouth,† Pembroke,‡ Portland,§ Chatham,|| Sheerness,¶ Woolwich,** Queenstown,†† and Deptford.‡‡ In the United States, local rules have been made for the inland waters, great lakes and western rivers. There are also rules for the Suez Canal and River

Danube.§§

Some of these local rules are not made under sect. 418 (4) of the Merchant Shipping Act, 1894, while others are. If they are not, a ship infringing them will not be held to blame unless the infringement did in fact contribute to the collision.¶¶ (Abbott's Law of Merchant Ships and Seamen (14th ed., 1901), pp. 951, 952.)

For the text of local rules as to the Avon River, Belfast, Bridgewater Canal, Carron River (Grangemouth), Clyde, Cork, Dublin, Holyhead, Humber, Manchester Ship Canal, Mersey, Ouse, Solent, Suez Canal, Suir River (Waterford), and Tees River, see Marden's Collisions at Sea, 4th ed. (1897), App. pp. 593—608, which also contains a short statement of the effect of some of the America (U.S.) Inland Rules of the Road (pp. 591, 592).

Since the passing of the Merchant Shipping Act, 1894, the following Acts of the subject have become law :—Derelict Vessels (Report) Act, 1896 (59 & 60 Vict. c. 12) ; Mersey Channels Act, 1897 (60 & 61 Vict. c. 21) ; Merchant Shipping Act, 1897 (60 & 61 Vict. c. 59), which amends the Act of 1894 with respect to detention for undermanning ; Merchant Shipping (Exemption from Pilotage) Act, 1897 (60 & 61 Vict. c. 61), which abolishes the exemptions from compulsory pilotage under 6 Geo. IV. c. 125, s. 59, continued under sect. 603

* Order in Council, February 26th, 1897.

† Ibid., May, 1897.

‡ Ibid., September 26th, 1891.

§ Ibid., June 29th, 1878.

|| Ibid., June 29th, 1888.

¶ Ibid., June 29th, 1888.

** Ibid., February 29th, 1868.

†† Ibid., February 29th, 1868.

‡‡ Ibid., February 29th, 1868.

§§ For the text of the above rules, see the Rules of the Road at Sea, 3rd ed.

¶¶ *The Montu Rosa*, (1893) P. 23 ; *The Margaret*, (1884) 9 App. Cas. 873.

The rules regarding inland navigation must necessarily be of a more heterogeneous and complex nature than those controlling the navigation of the sea, owing to the fact that the former are established for the most part by a variety of private bodies.

In addition to this, it is to be noted that the right of navigation on inland waters is also of a more complicated kind than that of navigation upon the sea, not only on account of the different classes of inland waters, but also from the restricted extent of the water-way available for navigation, and the consequent collision in many cases of the public right with the rights of private individuals. Lastly, it must be pointed out that the preservation and regulation of the navigation of inland waters, both of which are now included under the term "*conservancy*," are governed almost entirely by statute law, and may be clearly distinguished from the general *common law right to navigate* upon such waters.

For these reasons it has been considered advisable to treat of the subject as follows:—

1. *The General Right of Navigation, its Nature, Extent, and the Injuries thereto.*
 - (a) In tidal waters.
 - (b) In private waters.
2. *The Conservancy of Navigation and the Powers and Duties of Conservators.*

The bed of all navigable rivers, where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which belongs by law to the subjects of the realm.¹

There are two totally distinct and different things; the one is the right of property, and the other the right of navigation.

The general right of navigation in tidal waters.

of the Merchant Shipping Act, 1894, in the cases of vessels on voyages between ports in Sweden and Norway and London, but which does not abolish the exemptions from compulsory pilotage contained in sect. 625 of that Act (*The Columbus*, (1899) 8 Asp. M. C. 488); the Merchant Shipping (Liability of Ship-owners) Act, 1898 (61 & 62 Vict. c. 14); the Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict.

c. 44); the Anchors and Chain Cables Act, 1899 (62 & 63 Vict. c. 23); and the Merchant Shipping (Liability of Ship-owners and others) Act, 1900. For the text of these Acts see Abbott's Law of Merchant Ships and Seamen, 14th ed., App. pp. 1314—1332.

¹ *Gunn v. Free Fishers of Whitstable*. 11 H. L. 192; 35 L. J., C. P. 29; 12 L. T. 150.

The right of navigation is simply a right of way. The public, who have the right to navigate on an inland water, have no right of property therein.¹

Extends to all tidal waters which are navigable at any state of the tide.

Although the flux and reflux of the tide is *prima facie* evidence that a river is navigable, it does not necessarily follow that because the tide flows and reflows in any particular place, that it is therefore a public navigation although of sufficient size. The strength of the evidence arising from the flux and reflux of the tide must depend on the situation and nature of the channel. If it is a broad and deep channel, calculated to serve for the purposes of commerce, it will be natural to conclude that it has been a public navigation; but if it is a petty stream, navigable only at certain states of the tide, and then only for a short time and by very small boats,² it is difficult to suppose that it has ever been a public navigable river.³ The actual user of a tidal river for the purposes of navigation is of course the strongest evidence of its navigability.⁴

Where, therefore, a river ceases to be navigable, either from natural causes, such as the recess of the sea, or the accumulation of soil or mud in the channel, the river will cease to be navigable, at any rate till such obstruction be by some means counteracted.⁵

Mayor of Colchester v. Brooke.

In the case of *Mayor of Colchester v. Brooke*,⁶ Lord Denman, C. J., delivering the judgment of the Court, fully states the law on this point: "The evidence showed this to be a tidal river, "and, in the part in question, so shallow in certain states of the "tide, that the vessel could not float there, but necessarily "grounded. The plaintiffs contended that a right to navigate, "pass and repass, was merely the right to float along; and that "the facts showed that in this part of the river such a right "could not exist at all times of the tide. The learned judge "stated that a navigable river was so at all times; that a subject "might go upwards and downwards, though he might not be "able to reach the port or the deep water in one tide, or without

¹ *Orr Ewing v. Colquhoun*, 2 App. Cas. 839; *Abraham v. Great Northern Rail. Co.*, 16 Q. B. 596; 20 L. J., Q. B. 322, per Patteson, J.

² *Ilchester v. Rashleigh*, 5 T. L. R. 739; 61 L. T. 477; see *ante*, p. 16, n. 4. For definition of "navigable river," according to French law, as existing in Canada, see *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.), and for distinction between "navigable" and "boat-able" in American law, see Angell on

Watercourses, ch. 13.

³ *Rex v. Montague*, 4 B. & C. 598; 28 R. R. 420; *Mayor of Lynn v. Turner*, 1 Cowp. 36.

⁴ *Miles v. Rose*, 5 Taunt. 705; 15 R. R. 623; and per Bayley, J., in *Vooght v. Winch*, 2 B. & Ald. 662; 21 R. R. 446.

⁵ *Rex v. Montague*, 4 B. & C. 598; 28 R. R. 420; *Reg. v. Betts*, 16 C. B. 1022.

⁶ 7 Q. B. 339; 15 L. J., Q. B. 59.

“grounding; and that even if such grounding subjected him to
 “compensate for injury done, that did not affect the nature of
 “the right in respect to time of enjoyment. We are of opinion
 “that he was justified fully in so stating the law. No
 “authority directly in point was stated at the bar; nor have
 “we been able to find any after considerable search; but
 “upon principle the matter seems clear. It cannot be dis-
 “puted, that the channel of a public navigable river is properly
 “described as a common highway, although the analogy between
 “it and a highway on land is not complete in all particulars:
 “and there is no one circumstance which more decisively
 “affixes on a river the character of being public and navigable
 “in this sense of a highway, than the flow and reflow of the tide
 “in it. Now, if in such rivers it was held, that the character
 “did not extend higher up than the water sufficed to float
 “vessels at all times, or was suspended during such periods of
 “the tide as left the channel too shallow for that purpose—
 “rights of the public, invaluable and immemorial, in numerous
 “rivers, would be abridged, or rendered in many particulars
 “vexatiously uncertain, and in many cases be made nearly, if
 “not entirely, useless. The present case is an illustration of
 “this. Upon the evidence it appeared that vessels of a burthen
 “which usually traded to Colchester, could not, except at spring
 “tides, go up to the town in one tide. To say then that the
 “river ceased to be navigable, ceased to be a highway, at the
 “ebb or other states of the tide, when such vessels could not
 “float, is in effect to say that, except for a short period of every
 “month, they should not use the river at all for the purpose of
 “trading with Colchester. It is more reasonable to hold that
 “the term ‘navigable’ is a relative and comprehensive term,
 “containing within it all such rights upon the waterway as,
 “with relation to the circumstances of each river, are necessary
 “for the full and convenient passage of vessels and boats along
 “the channel. Nor will this be repugnant to any legal principle
 “applicable to the case. It does not interfere with the rights of
 “individuals on the banks (see *Ball v. Herbert*¹), but stands on
 “this broad ground: The right of soil in arms of the sea and
 “public navigable rivers, which the Crown *primâ facie* has
 “independently of any ownership in the adjoining lands, must
 “in all cases be considered as subject to the public right of

¹ 3 T. R. 253; 1 R. R. 695.

“passage, however acquired; and any grantee of the Crown must of course take subject to such right. Nor is this inconsistent with a permanent loss of such right, if, by accumulation of silt or any other natural cause, the channel becomes choked up (*Rex v. Montague*).¹ The law has made no provision for the clearing of such a highway, and, in such case, the river ceases to be navigable, at least until such causes are by some means counteracted. In this large sense, and with this large exception, the river is navigable, and is a highway at all times and all states of the tide; in any other sense the public right may become all but valueless.”

Change of course of a river does not destroy the right.

Where a navigable river changes its channels, although the soil of the bed and the right of fishing may be vested in the owner of the adjoining land, so as to bar the right of the Crown to the bed, and of the public to the fishery; it would appear that the right of navigation will follow to the new channel,² the test being whether the river remains tidal.³

So, where a river was formerly navigable but became silted up, and by Act of Parliament power was given to commissioners to restore the navigation, and they were authorized to make, and made, a new cut, the navigation of the same to be open on payment of tolls, it was held that the cut was a public navigable river, the obstruction of which was an indictable nuisance, and that the public had the same rights over it as they had over the original stream.⁴

The right is a paramount right to pass and anchor free of toll.

The right of navigation in public waters is a paramount right in all subjects of the realm to pass and to ground and to anchor at pleasure, free from toll,⁵ at all times and states of the tide,⁶ and in all species of vessels,⁷ independently of any usage or prescription to that effect. It is a right of free passage over the whole of the navigable channel;⁸ and it appears that a public river may be used by the public as a highway whenever it suits their convenience, whether such navigation be valuable or not.⁹

The public right includes all such rights as, with relation to

¹ 4 B. & C. 598; 28 R. R. 420.

² *Mayor of Carlisle v. Graham*, L. R., 4 Ex. 366; *ante*, Chap. II. p. 69, and Chap. VI. p. 357.

³ *Hale de Jure Maris*, p. 1, c. 6, p. 34; 1 Roll. Abr. 390; Roscoe on Crim. Evidence, 6th ed. p. 535.

⁴ *Reg. v. Betts*, 16 Q. B. 1022.

⁵ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; 35 L. J., C. P. 29; 12 L. T. 150; *Foreman v. Free Fishers of*

Whitstable, L. R., 4 H. L. 266; 21 L. T. 804.

⁶ *Mayor of Colchester v. Brooks*, 7 Q. B. 339; 15 L. J., Q. B. 39.

⁷ *Reg. v. Randall*, Car. & M. 496.

⁸ *A.-G. v. Terry*, L. R., 9 Ch. 423, per Mellish, L. J.; *Williams v. Wilcox*, 8 A. & E. 314; 47 R. R. 595; see *Orr Ewing v. Colquhoun*, 2 App. Cas. 839.

⁹ *A.-G. v. Lonsdale*, L. R., 7 Eq. 377; 38 L. J., Ch. 335; 20 L. T. 64.

the circumstances of each river, are necessary for the full and convenient passage of vessels along its channel. It is, therefore, no excess of this right, if a vessel, which cannot reach her destiny in a single tide, remain aground till the tide serves, and no toll can be demanded by the owner of the soil for such grounding.¹

An immemorial user of the foreshore in tidal and navigable waters, by the owners of fishing-boats and other craft, by fixing moorings in the soil for the purpose of attaching their boats to them, may be supported either as an ordinary incident of the navigation of such waters, or on a presumption of a legal origin by grant from the Crown of the foreshore to all persons navigating the waters to use it for fixing moorings. Such an immemorial user in the river Thames may be supported on the presumption of regulations prescribed by the port authority of the port of London.²

The right of navigation is a right in all subjects to pass, and to ground, and to anchor at pleasure free from toll, unless the toll is imposed in respect of some other advantage conferred upon them, or, at least, on the public.³ Though no toll can be taken for grounding, it is said by Coltman, J., that where vessels ground, perhaps by custom or agreement a fine may be payable to the owner of the soil for such grounding; but this dictum is rather questioned in *Gann v. Free Fishers of Whitstable*, Lord Chelmsford saying: "It may be correct as applicable to a "navigable river, because the owner may have given a consideration for the payment by rendering the river navigable."

A claim to an anchorage due cannot, therefore, exist merely in respect of the use of the soil, it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to the navigation was rendered by the owner of the soil who claimed the anchorage dues.⁴ Evidence of immemorial usage to take such dues will not support such a claim merely as incident to the ownership of the soil; but as anchorage dues are almost, if not universally, incident to a port, the uninterrupted payment of such dues is

Consideration
necessary to
support a
claim to toll.

¹ *Mayor of Colchester v. Brooke*, 9 Q. B. 339; 15 L. J., Q. B. 59.

² *A.-G. v. Wright*, (1897) 2 Q. B. 318, per Rigby, L. J. See for definition of mooring the judgment of Lord Esher, M. R.

³ *Gann v. Free Fishers of Whitstable*, per Lord Wensleydale; and see *ante*, Chap. I., pp. 53 *et seq.*

⁴ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; 35 L. J., C. P. 29; 12 L. T. 150.

evidence of the former existence of a port, and that a toll, claimed as a port or anchorage toll, had a legal origin.¹ A liability to make compensation for actual injury done to property by grounding is not to be confounded with a liability to pay toll for casting anchor in the soil itself.²

Right of navigation paramount to property of the Crown and its grantees in the soil.

The right of navigation is paramount to the rights of property of the Crown and its grantees in the bed of the river, and such property cannot be used in any way so as to derogate from, or interfere with, the public right of navigation.³ Any grant, therefore, of the Crown which interferes with the public right is void as to such parts as are open to such objection, if acted upon, so as to effect nuisance by working injury to the public right.⁴ If, therefore, the Crown grant part of the bed or soil⁵ of an estuary or navigable river, the grantee takes subject to the public right; and he cannot, in respect of his ownership of the soil, make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.⁶

"It is perfectly clear," says Macdonald, C. B.,⁷ "that all the soil under the salt water between high water mark and low water mark is the property of the Crown. Such property has certainly been (as it may be) communicated in a great many instances to the subject, but that is always subservient to the public right of the king's subjects generally. It is compared by Lord Hale, with his usual simplicity, to the case of a highway. The private right of the Crown may be disposed of, but the public right of the subject cannot, even if it be within this grant." Thus it has been held, that the obstruction by artificial means of a navigable river, though of more than twenty-one years' duration, will not operate as a bar to the public right.⁸

A navigable river is a public highway navigable in a

A navigable river is a public highway navigable by all her Majesty's subjects, in a reasonable way and for a reasonable

¹ *Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266; 21 L. T. 804.

² *Gann v. Free Fishers of Whitstable*, 11 H. L. 192. See as to tolls in ports, *ante*, Chap. I., pp. 53 *et seq.*, and *post*, Chap. IX.

³ *Gann v. Free Fishers of Whitstable*, *supra*; *Foreman v. Free Fishers of Whitstable*, *supra*; *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

⁴ *A.-G. v. Parmeter*, 10 Price, 412;

24 R. R. 723, 745.

⁵ *Rex v. Montague*, 4 B. & C. 598; 28 R. R. 420.

⁶ *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; see also *A.-G. v. Parmeter*, 10 Price, 412—H. L.; 24 R. R. 723, 745.

⁷ *A.-G. v. Parmeter*, 10 Price, p. 400; 24 R. R. 723, 745.

⁸ *Tought v. Winch*, 2 B. & Ald. 662; 21 R. R. 446.

purpose.¹ "The right of the public on navigable rivers is not confined to the passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient to those ends."²

reasonable way and for a reasonable purpose.

For traffic there are rights *eundo et redeundo et commorando*, so far as reasonable for loading, and for a wind.³ "A navigable river," says Wood, B.,⁴ "is a public highway, and all persons have a right to come there in ships and to unload, moor, and stay there as long as they please. Nevertheless, if they abuse that right so as to work a private injury, they are liable to an action. The privilege of the plaintiff must be subservient to the right of the public."⁵

A riparian owner has a right to moor a vessel of ordinary size alongside a wharf for the purpose of loading and unloading at reasonable times and for a reasonable time; and the Court will restrain by injunction the owner of adjoining premises from interfering with the access of such vessel, though the vessel may overlap his premises; though such a vessel could not be allowed to interfere with the proper right of access to the neighbour's premises, if used as a dock by vessels.⁶

The banks of navigable rivers are, as has been before explained, not *publici juris*, but are private property; and there is, therefore, no common law right in the public to land themselves or their goods, or to moor their vessels thereon, or to pass over the banks for the purpose of towing vessels or barges. Such rights, in all cases, depend on usage or prescription.⁷ The right of towing does exist by custom on most navigable rivers; and in the case of *Wyatt v. Thompson*,⁸ a jury found, "That the custom of mooring barges in the Thames at low water is for one tide at the piles in front of the wharf, and if there are no piles, the custom does not allow barges to moor at the wharf unless through distress."

No public right of landing, mooring or towing on the banks.

Riparian owners on the banks of a tidal navigable river have similar rights and natural easements to those which belong to a

Private rights arising out of the public right.

¹ *Original Hartlepool Colliers v. Gibb*, 5 Ch. D. 713, per Jessel, M. R.

² Per Bayley, J., in *Rex v. Russell*, 6 B. & C. 566; 30 R. R. 432.

³ Per Holroyd, J., in *Rex v. Russell*, 6 B. & C. 566; 30 R. R. 432.

⁴ *Anon.*, Durham Assizes, 1808; 1 Camp. 517, note.

⁵ See *Stubbs v. Hilditch*, 51 J. P. 758.

⁶ *Original Hartlepool Colliers v. Gibb*, 5 Ch. D. 713; see *Dalton v. Denton*, 1 C. B., N. S. 672.

⁷ *Ball v. Herbert*, 3 T. R. 262; 1 R. R. 695; see *ante*, Chap. II., pp. 87 *et seq.*

⁸ 1 Esp. 252; see, however, *A.-G. v. Wright*, (1897) 2 Q. B. 318, *ante*, p. 433.

riparian owner above the flow of the tide subject to the public right of navigation.¹

Right of
access,

The right to navigate a tidal river is common to the subjects of the realm, but it may be connected with a right to the exclusive access to particular land on the bank of the river; and the latter is a private right to the enjoyment of land, the invasion of which may form ground for an action of damages or for an injunction, for the right of a riparian owner to the use of the stream does not depend on the ownership of the soil of such stream, but of the soil bounding it.²

"Unquestionably the owner of a wharf on the bank (of a public navigable river) has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *quâ* owner or occupier of any lands on the bank; nor is it a right which *per se* he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive right of access from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages, or restrained by an injunction.

"I cannot entertain any doubt that the riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights as an ordinary owner underlying and controlled, but not extinguished, by the public right of navigation."³

includes right
of landing
and crossing
the shore for
that purpose.

This right of access includes the right of landing in the ordinary manner, and of passing over the soil of the bed of the river at low water for that purpose, even where the soil is not in the Crown, but in a private owner, as it is necessary for the full enjoyment of the right of navigation,⁴ and as the right of navigation exists at all states of the tide.⁵ Persons having a right to land at a quay may pass over a barge moored alongside it so as to be a private nuisance, if it is so fixed as not

¹ *Lyon v. Fishmongers' Co.*, 1 App. C. 662; 45 L. J., Ch. 68; 35 L. T. 569; *North Shore Ry. v. Pion*, 14 App. Cas. 612. See *ante*, Chap. II. p. 93.

² *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662.

³ *Ibid.*, per Lord Cairns, C.; as to right

of access see *ante*, Chap. II. p. 93.

⁴ *A.-G. v. Wemyss*, 3 App. Cas. 192; *Marshall v. Ulleswater Co.*, L. R., 7 Q. B. 172; 41 L. J., Q. B. 41; 25 L. T. 793; see *ante*, Chap. I. p. 40.

⁵ *Mayor of Colchester v. Brooke*, 7 Q. B. 639.

to be readily abatable and there is no other route available, but not to use the barge as a means of passage except in such states of the tide as would have enabled them to land directly on the quay.¹

Any interference with the right of access is an injury to private property, and as such actionable without proof of special damage.²

The obstruction of the navigation of a public navigable river is a public nuisance, and the subject of indictment³ and information,⁴ or of an action⁵ on proof of special damage. Obstructions can also be abated by decree.⁶

Obstruction of the public right is a public nuisance.

The Crown cannot interfere with the public right by grant;⁷ it can only be abridged by Act of Parliament, writ *ad quod damnum*, or natural causes.⁸

Thus in the case of *A.-G. v. Parmeter*,⁹ buildings, erections, and inclosures, between high and low water mark in the harbour of Portsmouth, interrupting the flux and reflux of the tide, and obstructing the public right of navigation, were abated by decree of the Court of Exchequer, although they were erected by sanction and authority of the corporation under a grant from the Crown, the Court being of opinion, that "where a part of the sea coast "or shore, being the property of the Crown, and giving *jus* "privatum to the king, is granted to a subject for uses so as to "detrimental to the *jus publicum* therein, such grant is void as to "such parts as are open to such objection, if acted upon so as to "effect nuisance by working injury to the public right, or it is a "grant which does not divest the Crown or invest the grantee."

Building locks on the Thames to the obstruction of navigation was, in an early case, held to be a nuisance, Holt, C. J., saying: "To hinder the course of a navigable river is against Magna Charta, and anything which aggravates the fact, though not "directly to the issue, may be given in evidence upon it, as here "the taking of money to let people pass."¹⁰

¹ *Eastern Counties Ry. v. Dorling*, 5 C. B., N. S. 821; 28 L. J., C. P. 202.

² *Rose v. Groves*, 5 M. & G. 613; see *Dalton v. Denton*, 1 C. B., N. S. 672; and see *ante*, Chap. II. p. 94.

³ *R. v. Grosvenor*, 2 Stark. 511; 20 R. R. 732.

⁴ *A.-G. v. Richards*, 2 Anst. 603; 3 R. R. 632.

⁵ *Rose v. Miles*, 4 M. & S. 101; 16 R. R. 405; cf. remarks of Parke, J., in *Duke of Newcastle v. Clark*, 2 Moore, Rep. 666; 20 R. R. 583.

⁶ *A.-G. v. Parmeter*, 10 Price, 412; 24 R. R. 723, 745.

⁷ *A.-G. v. Parmeter*, 10 Price, 412 (H. L.); 24 R. R. 723, 745; *A.-G. v. Johnson*, 2 Wils., Ch. C. 87; 18 R. R. 156.

⁸ *R. v. Montague*, 6 D. & R. 616; 28 R. R. 420; 4 B. & C. 89.

⁹ 10 Price, 378; 24 R. R. 723, 745; see also *A.-G. v. Burridge*, 10 Price, 350; 24 R. R. 705; *A.-G. v. Richards*, 2 Anst. 603; 3 R. R. 632.

¹⁰ *R. v. Clark*, 12 Mod. 615.

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that proper record-keeping is essential for transparency and accountability, particularly in financial matters. The text suggests that organizations should implement robust systems to track every aspect of their operations, from procurement to sales.

2. The second part of the document addresses the challenges faced by organizations in managing their resources effectively. It highlights the need for strategic planning and efficient allocation of funds. The author argues that without a clear vision and a well-defined strategy, organizations risk wasting resources and failing to achieve their long-term goals. The text provides several practical tips for improving resource management, such as regular budget reviews and the use of performance metrics.

3. The third part of the document focuses on the role of leadership in driving organizational success. It stresses that leaders must be able to inspire and motivate their teams, while also providing clear direction and support. The text discusses various leadership styles and their impact on organizational culture and performance. It encourages leaders to be open to feedback and to foster a culture of continuous improvement.

4. The fourth part of the document explores the importance of innovation and creativity in a competitive market. It argues that organizations must constantly seek new ways to improve their products and services, and to adapt to changing market conditions. The text provides examples of successful innovation strategies and offers advice on how to create an environment that encourages creative thinking and experimentation.

5. The fifth part of the document discusses the importance of maintaining strong relationships with stakeholders, including customers, suppliers, and the community. It emphasizes that a company's reputation and success are closely tied to the quality of its external relationships. The text offers strategies for building trust and loyalty, such as transparent communication and consistent delivery of value.

6. The sixth part of the document addresses the issue of risk management. It explains that organizations must identify potential risks and develop effective strategies to mitigate them. The text discusses various types of risks, including financial, operational, and reputational risks, and provides guidance on how to assess and manage these risks proactively.

7. The seventh part of the document discusses the importance of employee development and training. It argues that investing in the growth of the workforce is crucial for long-term success. The text provides ideas for creating a learning culture, such as offering regular training opportunities and encouraging cross-functional collaboration.

8. The eighth part of the document discusses the importance of sustainability and social responsibility. It argues that organizations have a responsibility to their stakeholders to operate in an ethical and environmentally sound manner. The text provides examples of sustainable business practices and offers advice on how to integrate sustainability into the core business strategy.

9. The ninth part of the document discusses the importance of data analysis and reporting. It explains that organizations must be able to collect, analyze, and interpret data to make informed decisions. The text provides tips for improving data collection and analysis, and for presenting the results in a clear and concise manner.

10. The tenth part of the document discusses the importance of maintaining a strong legal and regulatory framework. It emphasizes that organizations must comply with all applicable laws and regulations to avoid legal penalties and reputational damage. The text provides advice on how to stay up-to-date on legal changes and how to implement effective compliance programs.

11. The eleventh part of the document discusses the importance of maintaining a strong financial position. It argues that organizations must manage their cash flow and debt effectively to ensure long-term financial stability. The text provides tips for improving financial performance, such as reducing costs and increasing revenue.

12. The twelfth part of the document discusses the importance of maintaining a strong brand identity. It explains that a strong brand is a key asset for any organization, and it provides advice on how to build and maintain a consistent brand image across all channels.

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[illegible]

a decree of the Master of the Rolls, that this was such a tangible and substantial interference with the navigation as ought to be restrained by the Court. The Master of the Rolls (Sir G. Jessel) was of opinion that, independent of any proof of actual obstruction, an injunction ought to be granted, on the ground that no man has a right to build on the bed of a navigable river, and that it is not any answer to say that at the present moment the obstruction is not a nuisance, for it may become so—a change may take place in the mode of navigating the river, so as to make that part of it navigable which was not before navigable in any useful sense. His Lordship therefore held that, although an indictment would not lie until an actual nuisance had been committed, a Court of Equity ought to interfere to restrain the continuance of the obstruction.

The Lord Chancellor and Lords Justices, in the Court of Appeal, confine themselves to the question that there was an actual obstruction and nuisance to the navigation; but Cairns, L. C., says: "I cannot say that there might not be an encroachment of so trifling a nature that the Court would not interfere;"¹ and Mellish, L. J., says: "It is true there may be spots in the river where space is not wanted, and where that which would otherwise be a nuisance might not be such an obstruction of the highway as to make it the duty of this Court to interfere; but it appears to us that the space is actually wanted for the purposes of navigation, and in such a case there is no difference between a highway on land and a highway on water. It is no answer to say that there is room for the ships, and that if they are navigated with skill and care there will be no obstruction. Those who use the river are entitled to say that they have a right to the whole of the space; and, in my opinion, it is not any answer that the obstruction only occurs at certain times of the tide, and in some respects the alteration would be advantageous. The advantage of one person cannot be set off against the disadvantage of another. If this is an indictable nuisance there must be a remedy in the Court of Chancery, and that remedy is by injunction."

In *A.-G. v. Lonsdale*,² Malins, V.-C., held that the erection of a jetty by the owner of the bed of a tidal river ought to be

¹ See *Reg. v. Russell*, 3 E. & B. 942; E. 143; 45 R. R. 426.
23 L. J., M. C. 175; *R. v. Tindal*, 6 A. &

² L. R., 7 Eq. 377.

restrained by injunction, on the ground that though no actual damage to the navigation was proved, future damage might result; but Lord Blackburn in *Orr Ewing v. Colquhoun*,¹ remarking on these cases, says: "In the case of *A.-G. v. Lonsdale*, the obstruction was in a tidal river, but it occupied "one-third of the breadth of the river. In *A.-G. v. Terry*,² there "was an actual occupation, by the piles put in by the defendant, "of part of what was used for the navigation and wanted for "navigation. The Master of the Rolls submitted an opinion "that the Court of Equity might order the piles to be removed, "though doing no present damage to the navigation, if there "might be damage hereafter: I apprehend on the ground of the "piles being placed on the soil of the Crown, and therefore a "wrong to the Crown. How that may be in such a case it is "unnecessary to consider. I think it clear law in England that, "except at the instance of a person (including the Crown) whose "property is injured, or of the Crown in respect of some injury "to a public right, there is no power to prevent a man making "an erection on his own land, though covered with water, merely "on speculation that some change might occur that would render "that piece of land, though not now part of the water-way, at "some future period available as part of it—I think that the "land being covered with water is, in such a case, a mere accident, and that the defenders are as much at liberty to build "on the bed of a river (if thereby they occasion no obstruction) "as they would be to build on an island which might at some "future period be swept away."

It would seem, therefore, to be the law, that the erection of works on the bed of tidal waters is not indictable or actionable as a nuisance unless and until actual interference with the navigation is proved, and that no anticipated injury is sufficient to maintain an action; but that an erection which, at the time of creation, was harmless, may, owing to the change of bed or other causes, become at some future time a nuisance; and as soon as that is the case, it may be abated by indictment or decree.

Where
causing actual
obstruction,
how justifi-
able.

Where, however, there is any actual obstruction to the navigation, it would appear that the question whether such obstructions are a nuisance or not will depend on this,—Whether upon the whole they produce public benefit or not; not giving to the terms "public benefit" too extended a sense,

¹ 2 App. Cas. p. 61.

² L. R., 9 Ch. 423; 30 L. T. 215.

but applying them to the public frequenting the place or port where the erection is—any private benefit to the trade of a person who causes the obstruction being too remote to be held to the advantage of the public generally so as to justify the erection.¹

In the case of *R. v. Russell*,² which was the trial of an indictment for obstructing the navigation of the Tyne by erecting some coal staiths there, Bayley, J., left these questions to the jury: “Were the staiths erected in a reasonable place? Was there a reasonable space left for the public navigating in the Tyne? Were the staiths a public benefit? Did the public benefit countervail the prejudice done to individuals?” The jury in consequence of this direction found the defendants not guilty, and the Court of Queen’s Bench, on a motion for a new trial on the ground of misdirection by the learned judge, refused to disturb the verdict. *R. v. Russell.*

In *Rex v. Ward*, Lord Denman, delivering the judgment of the Court, thought *R. v. Russell* not well decided; and lays down the law that it is no defence to such an indictment (*i.e.*, for obstructing a navigable river) that though the work be in some degree a hindrance to navigation, it is advantageous in a greater degree to other uses of the port³ (or river). In *Reg. v. Randall*, at *nisi prius*, Wightman, J., held that the question for the jury was, whether the wharf occasioned any hindrance to the navigation of the river by vessels of any description, and not whether a benefit resulted to the general navigation—*i.e.*, that they were not to consider the defence that since the wharf was made boats of heavy burden could unlade there, which before anchored in the middle of the river, and so the channel was kept clear.⁴ *Rex v. Ward.*

Referring to *R. v. Grosvenor*,⁵ in *Rex v. Ward*, Lord Denman further says: “Lord Tenterden in *R. v. Grosvenor* only submitted to the jury whether the public had benefited by the alteration; and this was plainly confined to such benefits as the public might have derived from it in the exercise of that very right, the invasion of which was treated as a nuisance.”⁶

In *A.-G. v. Terry*,⁷ Jessel, M. R., disapproves in strong terms *A.-G. v. Terry.*

¹ *A.-G. v. Terry*, *supra*; *R. v. Ward*, 4 A. & E. 384; 43 R. R. 364; *Rex v. Grosvenor*, 2 Stark. 511; 20 R. R. 732.

² 6 B. & C. 566; 30 R. R. 482.

³ 4 A. & E. 384; 43 R. R. 364.

⁴ Car. & M. 496.

⁵ 2 Stark. 511; 20 R. R. 732; at *nisi prius*. (A corporation being con-

servators of a river and owners of the soil cannot authorize a lessee to erect a wharf which produces inconvenience to the public in the use of the river for navigation.) See *R. v. Hollis*, 2 Stark. 536.

⁶ 4 A. & E. 384; 43 R. R. 364.

⁷ L. R., 9 Ch. 423; 30 L. T. 215.

of *Rex v. Russell*, and expresses his view of the law in an elaborate judgment. "It was said that that had been decided "in the well-known case of *Rex v. Russell*.¹ In my opinion "that case is not law, and it is right to say so in the clearest "terms ; because it is not well that cases should continue to "be cited which have been virtually overruled, although the "judges have not said so in express terms. In that case there "had been some staiths erected in the river Tyne, and a very "eminent judge of those days, Mr. Justice Bayley, in charging "the jury, had pointed out that they were erected simply for "the purpose of carrying on trade. He said² that 'the staiths "were not merely a private benefit, for that by means of them "the coals were brought to market at a smaller expense, and in "'a better condition, in both which respects the public were "benefited ;' and he then left to their decision the following "questions : 'Were the staiths erected in a reasonable place ? "'Was there a reasonable space left for the public navigating "in the Tyne ? Were the staiths a public benefit ? Did the "'public benefit countervail the prejudice done to individuals ?' "The jury said that in consequence of this direction they found "the defendants not guilty.

"The case was brought before the full Court, consisting of the "same judge, Mr. Justice Bayley, and two other very eminent "judges, Mr. Justice Holroyd and Lord Tenterden. Mr. Justice "Bayley adhered to his own opinion ; Lord Tenterden differed ; "Mr. Justice Holroyd, though he came to the conclusion the "verdict should not be disturbed, did not lay down the law "quite in the same terms as Mr. Justice Bayley, as regards the "public benefit. As I understand it, he only put the law to "this extent, that the public benefit might possibly countervail "the public injury ; for really they are both public, so that, "taking it on the whole, the public was benefited.

"That case came under discussion in the case of *Rex v. Ward*,³ "where Sir William Follett, whose interest it was to support "*Rex v. Russell* as far as he could, thus speaks of it :⁴ 'The "'doctrine of *Rex v. Russell* need not come under discussion ; nor "is there any conflict of authorities. Erections may be made in "'a harbour, below high water mark, and in places where vessels "'might, perhaps, have sailed ; and the question whether they

¹ 6 B. & C. 566.

² 6 B. & C. 570.

³ 4 A. & E. 384.

⁴ 4 A. & E. 395.

“are a nuisance, or not, will depend on this: whether, upon the whole, they produce public benefit; not giving to the terms “public benefit” too extended a sense, but applying them to the public frequenting the port.’

“I take it that that statement in argument of Sir William Follett was a correct statement of the law. Lord Denman, in giving the opinion of the full Court of Queen’s Bench, says:¹ ‘The greatest weight is due to the authority of Mr. Justice Bayley, who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent judge to Mr. Justice Holroyd, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But, when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing up’—that is, in the summing up of Mr. Justice Bayley—‘on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant’s prejudice by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing up, and even to its close, by its connection with that argument. Mr. Justice Bayley himself, who delivered his judgment after Mr. Justice Holroyd, takes a much wider range, maintaining the right to estimate the balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for an example the purchasers of coals sent from the indicted staith to a distant market. Lord Tenterden thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, “Whether the navigation and passage of vessels over this public navigable river was injured by those erections.”’ Now that is the final judgment; but there had been a previous judgment, a short judgment, as to the whole of the case, and what Lord Denman said was this:² ‘My understanding at the trial certainly was, that the question was much the same as that in *Rex v. Russell*,³ a case the authority of which has been much doubted, and is, perhaps, likely to be more so as it is

¹ 4 A. & E. 402.

² 4 A. & E. 400.

³ 6 B. & C. 566.

“ ‘further examined,’ so that it must be taken to have been the
 “ ‘opinion of the full Court of Queen’s Bench, in Lord Denman’s
 “ ‘time, that the summing up of Mr. Justice Bayley in *Rex v.*
 “ ‘*Russell* could not be supported ; he does not say so in distinct
 “ ‘and clear terms, but the effect of the judgment of the full Court
 “ ‘was, that they agreed with Lord Tenterden, and disagreed with
 “ ‘Mr. Justice Bayley. What really were the points on which they
 “ ‘disagreed? I think they were two, and I think on those two
 “ ‘points the charge of Mr. Justice Bayley was erroneous. In the
 “ ‘first place, I think the benefit, whatever it is, must be a public
 “ ‘benefit to the same public, that is, the same public who use
 “ ‘the navigation, or, as it was put by Sir William Follett, ‘the
 “ ‘‘public frequenting the port.’ In the next place, I think that
 “ ‘the benefit to the public must be a direct benefit, whereas the
 “ ‘benefit which he was considering was an indirect, and, as it
 “ ‘appears to me, too remote a benefit. It was that coals came
 “ ‘to the London market in rather a better condition, and were,
 “ ‘possibly, sold at a lower price. That does not appear to me
 “ ‘to be a public benefit in the sense of the term in which it ought
 “ ‘to be used when considering the question of nuisance.

“ Then, it may be asked, what is a public benefit in my view?
 “ I say it is a benefit of a similar nature, showing that on the
 “ balance of convenience and inconvenience the public at that
 “ place not only lose nothing, but gain something by the erec-
 “ tion. There are two cases in the books which will illustrate
 “ my meaning, and, I think, fairly show what sort of public
 “ benefit it is. The first is this. In the case of a tidal harbour
 “ of irregular shape, it may be desirable to straighten the
 “ sides, the result of which would be, of course, in the parts
 “ where you take away the water-way, to diminish the area
 “ usable for navigation ; in those parts where you add to
 “ the water-way you would increase the area. If, in the
 “ course of this straightening, the whole of the harbour is
 “ made larger and more commodious, then, I think, the public
 “ benefit gained at the particular point where the navigable
 “ water is narrow overbalances the public injury, and, in that
 “ sense, the improvement of the harbour would not be a
 “ nuisance ; and that is what I understand Lord Hale intends
 “ to say in the passage which has been referred to.¹ Another

¹ Hale de Portibus Maris, Harg. Tract. C. p. 572 ; *The Portsmouth Harbour*
 85 ; *The Sutton Pool case*, cited 6 B. & *case*, cited *ibid*.

"case is this, which also appears in reported cases: Suppose
 "you have a navigable river, and it is necessary to cross it
 "by a bridge, and the river is too wide to allow of a bridge
 "of a single span, you must then put one or more piers
 "into the middle of the river, and, of course, according to the
 "extent you introduce bridge piers or bridge arches into a
 "navigable river, you to some extent diminish the water-way,
 "and to some extent, perhaps to a more or less material extent,
 "obstruct the navigation.¹ But it is for the public benefit at
 "that spot that a public road should be carried over the river
 "by the bridge, and that benefit may so far exceed the trifling
 "injury, if injury it be, to the navigation, that, on the whole,
 "a Court of justice may fairly come to the conclusion that a
 "public benefit of a much greater amount has been conferred on
 "the public than the trifling injury occasioned by the insertion
 "of the piers into the bed of the river. In that case, also, it
 "would be a public benefit that would counterbalance the public
 "injury. I give those as illustrations, but I think it must be
 "confined, as put by Sir William Follett in his argument, to
 "cases of public benefit, and not used in too extended a sense.

"In this case really I have no evidence whatever of benefit to
 "the public. The defendant is doing this for the purposes of
 "his own trade: it is too remote a benefit to the public to say
 "that the encouragement of the trade of a single individual is
 "therefore a benefit to the public."²

Weirs or other fixed engines for taking fish, which obstruct
 the whole or part of the navigation of a public navigable river,
 are illegal, and a nuisance, unless granted by the Crown before
 the reign of Edward I. It does not appear that the Crown ever
 had the right to obstruct the navigation by so erecting weirs;
 but such weirs as had been erected under grants from the Crown
 before the reign of Edward I. were subsequently legalized by
 stat. 25 *Edw. III.* c. 4. If a weir which has been so granted
 and legalized, at the time of the grant obstructed the navigation
 of only a part of the river, it does not become illegal by the
 stream changing its bed, so that the weir obstructs the only part
 of the navigable passage remaining; but where the Crown had
 no right to obstruct the whole passage of the river, it had no
 right to erect a weir obstructing a part, except subject to the

Weirs ob-
 structing
 navigation
 illegal.

¹ See *Reg. v. Betts*, 16 C. B. 1022.

² For statement of the above case, see
ante, p. 438.

rights of the public; and, therefore, in such a case, the weir would become illegal, upon the rest of the river being so choked, that there could be no passage elsewhere.

Williams v. Wilcox.

The above propositions were laid down by the Court of Queen's Bench in the case of *Williams v. Wilcox*.¹ "If," says Lord Denman, C. J., "the subject had, by common law, a right of "passage in the channel of the river, paramount to the power "of the Crown, we cannot conceive such right to have been "originally other than a right locally unlimited to pass in all "and every part of the channel. The absence of any right to go "extra viam, in the case of a channel being choked, and the want "of definite obligation to repair, only render it more important "that the right of passage should extend to all parts of the "channel. If, subject to this right, the Crown had the pre- "rogative of raising weirs in such parts as were not required by "the subject for the purposes of navigation, it follows, from the "very nature of a paramount right on the one hand, and a "subordinate right on the other, that the latter must cease "whenever it cannot be exercised but to the prejudice of the "former. On the other hand, there is nothing unreasonable in "supposing the right to erect the weir, subject to the necessities "of the public when they should arise. We cannot see any "satisfactory evidence that the power of the Crown in this "respect (i.e., of obstructing the navigation) was greater at the "common law before the passing of Magna Charta than it has "been since. We are therefore of opinion that the legality of "the weir cannot be sustained on the supposition of any power "existing by law in the Crown in the time of Edward I., which "is now taken away. But this does not exhaust the question, "because what was not legal at first, may have been subsequently "legalized. If, upon examination of the stats. 23 *Edw. III. c. 4*, "&c., relied on by the plaintiff, such a grant, whether valid or "not at common law, appears to be saved by their operation, the "object of the defendants falls to the ground; and we think that "to be the true construction of the statutes."²

A private individual cannot abate a public nuisance.

Though it would appear that a public nuisance may be abated in a peaceable manner, a private individual cannot abate a public

¹ 8 A. & E. 314; 7 L. J., Q. B. 229; 47 R. R. 595. For the law as to weirs in non-navigable rivers, see *Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657, ante,

Chap. VI. p. 371; and as to weirs obstructing fishery in tidal waters, p. 360.

² Per Lord Denman, C. J., in *Williams v. Wilcox*, 8 A. & E. 314; 47 R. R. 595.

nuisance, unless it does him some special injury beyond that which is suffered by the rest of the public.¹ Thus, in *Mayor of Colchester v. Brooke*,² it has been held, that where property, such as oysters, are placed in the bed of a navigable river so as to be a nuisance, a person navigating is not justified in damaging such property, by running his vessel against it, if he has room to pass without so doing. So, in *Dimes v. Petley*,³ the defendant, under similar circumstances, was held not justified in running his ship against a wharf projecting into a public river; the Court being of opinion that a person under such circumstances can only interfere with a public nuisance so far as is necessary to exercise his right of passage, and cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience.

The obstruction of a public navigation is, moreover, actionable on proof of special damage. Thus, where the plaintiff was navigating his barge on a public navigable creek, and defendant wrongfully moored his barge across it, and kept the same so moored, and prevented the plaintiff from navigating his barges, whereby the plaintiff had to convey his goods a great distance by land, this was held to be such special damage for which an action would lie.⁴ Any interference with the right of access to a wharf or landing-place, being an injury to property quite distinct from the injury to the public right, is actionable, without any proof of special damage.⁵ Whether an obstruction to a river amounts to an interference with the right of access is a question of fact to be determined in each particular case.⁶

Any person who erects or keeps in a navigable river an obstruction to the navigation is responsible for any injury caused thereby. Thus, in *Brownlow v. Metropolitan Board of Works*,⁷ the defendants were held liable at the suit of the owner of a vessel which sustained damage by grounding on a pile negligently placed on the foreshore by a contractor employed by them. So, the owners of structures on the shores of public rivers which are not nuisances if kept in proper repair, may be liable for damage occasioned

Obstruction of navigation actionable on proof of special damage.

Obstruction of right of access actionable without giving proof.

Responsibility for damage caused by obstructions.

¹ See *post*, Chap. X.

² 7 Q. B. 339.

³ 15 Q. B. 283.

⁴ *Rose v. Miles*, 4 M. & S. 101; 16 R. R. 405; see *Chichester v. Lethbridge*, Willes, 71; *Williams' case*, 5 Coke, 145.

⁵ *Lyon v. Fishmongers' Co.*, 1 App. C. 662; *Rose v. Groves*, 5 M. & G. 613; see *ante*, p. 435, and Chap. II. p. 94.

⁶ *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.).

⁷ 16 C. B., N. S. 546.

by negligence. Thus, in *White v. Phillips*,¹ the defendants, wharf owners on the river Thames, kept a campshed, a structure of piles and planks, placed there by their predecessors to support an excavation in front of the wharf. The campshed was originally properly constructed, but was suffered to be out of repair. The Court held that the defendants were liable for damage caused to a barge which was brought to the wharf for the purpose of loading, and was there so moored by those in charge of her, that, on the recess of the tide, she struck on a submerged pile of the campshed, and was injured; on the ground that a duty was cast on the defendants to keep the campshed in repair, or to give notice of the danger. The mere fact, however, that the cause of injury is the property of a man, does not make him responsible for damage caused by it.² Thus, where a declaration stated that the defendants were possessed of a mooring anchor, kept and fixed by them in a known part of a navigable river, covered by the ordinary tides; that the anchor became removed, and remained in another part of the river, covered by the ordinary tides, not indicated, whereof the defendants had notice; and although they had means and power of refixing and securing the anchor, and indicating it, they neglected to do so, whereby the plaintiff's vessel, while sailing in a part of the river ordinarily used by ships, ran foul of and struck the anchor, and was thereby damaged, it was held that the declaration was bad, as not showing that defendants were privy to the removal of the anchor, or that it was their duty to refix it, and to indicate it.³

Maule, J.: "This declaration, in effect, states that an anchor, the property of defendants, somehow was placed in a part of a navigable river; but *how*, is not stated. The circumstances of the anchor being defendants' property, will not, of itself, render them liable. To have this effect, it must amount to a public nuisance or a private injury *by them*. This declaration carefully steers clear of stating that the defendants did the mischief. It shows about as good a cause of action as if it stated that somebody beat the plaintiff with the defendants' stick. The case falls within *The King v. Watts*,⁴ and *Brown v. Mallett*."⁵

In *Curling v. Wood*,⁶ the defendant, a wharfinger, was held

¹ 15 C. B., N. S. 245.

² See *River Wear Commissioners v. Adamson*, 2 App. Cas. 771; 47 L. J., Q. B. 193; 37 L. T. 543, *post*, p. 451.

³ *Handcock v. York and Newcastle*

Railway, 10 C. B. 348.

⁴ 2 Esp., N. P. C. 675; 5 R. R. 766.

⁵ 5 C. B. 599.

⁶ 16 M. & W. 628 (Ex. Ch.).

liable for negligently mooring the plaintiff's vessel, which was alongside his wharf, "for reward to him the defendant," whereby it was damaged on the recess of the tide, by striking against some woodwork in front of the wharf. It was argued that there was no duty disclosed, whereby the action could be maintained; but the Court held, that whatever the duties of wharfingers might be generally, here the defendant moored the vessel for profit to him, and was liable for negligently placing the vessel where it became damaged, he knowing the state of the woodwork.

Where the obstruction of the public right of navigation is authorized by statute, no action will lie for damage caused by the due execution of the works authorized by the statute, but if the persons so authorized exceed their powers or are guilty of negligence in carrying out their works, they will be responsible for damage so occasioned.¹

Obstructions
authorized by
statute.

In *Kearns v. The Cordwainers' Co.*,² the conservators of the Thames were authorized by their Act (sect. 53 of 20 & 21 Vict. c. cxlvii.) to grant licences to owners and occupiers of land fronting the Thames, to make piers and jetties, &c. on the bed of the river; and it was provided by sect. 179, that none of the powers of the Act were to abridge any right to which any occupiers of any lands were entitled. It was held, that no action would lie by the owner of land on the banks, against another owner, for erecting a jetty by licence from the conservators, which merely interfered with the plaintiff's right as one of the public to navigate the river, the effect of the statute being to license buildings which interfered with the navigation of the river. But in *Lyon v. Fishmongers' Co.*,³ it was held, that under the same section no interference with the private right of access to a wharf was authorized, such a right being within the exception in sect. 179.

In *Abraham v. Great Northern Railway*,⁴ to an action brought for obstructing the navigation of a river, it was pleaded that the works complained of were authorized by the Railway Clauses Consolidation Act, and the Court held that the Act applied as well to navigable as to non-navigable rivers, and that the works were authorized and that the plea was good, although it did not aver that "as little damage was done as possible."

¹ As to this, see *Cracknell v. Thetford*, L. R., 4 C. P. 529; 38 L. J., C. P. 353, and *ante*, Chap. V. pp. 268 *et seq.*

² 6 C. B., N. S. 388; 28 L. J., C. P. 285; see *A.-G. v. Conservators of the*

Thames, 1 Hem. & M. 1.

³ 1 App. Cas. 662; see *ante*, Chap. II. pp. 93 *et seq.*

⁴ 16 Q. B. 586; 20 L. J., Q. B. 322.

In *Jolliffe v. Wallasey Local Board*,¹ the defendants were authorized by Act of Parliament to make a pier, &c. They did so according to plans deposited with the admiralty. They also made a floating landing-stage attached by chains to the land, and also by anchors fixed by permission in the bed of the Mersey beyond the limits on their plans. The plaintiff's steam tug struck on one of the anchors and was injured. On a special case stated by an arbitrator it was found that the defendants in doing what they did, acted under a *bonâ fide* belief that they were acting within their powers—that they were not guilty of negligence in the mode of laying down and mooring the anchors, but that they were guilty of negligence in not properly buoying the anchors so as to indicate their position; and the Court held upon this finding that they were guilty of negligence, and responsible for the damage.

In *Brownlow v. Metropolitan Board*,² it was held, that the Metropolitan Board of Works have no power under the Metropolis Management Act (18 & 19 Vict. c. 120, s. 185), to erect any works on the bed of the Thames without first obtaining the consent of the admiralty, and of the conservators of the river, and that they were liable for damage done to a vessel from grounding on a pile negligently placed on the foreshore by a contractor in their employment.

Duties and liabilities of persons navigating.

It is the duty of a person using a public navigable river, with a vessel of which he is possessed, and has the control and management, to use reasonable skill and care to prevent mischief to others; and in the case of collision he must sustain, without compensation, the damage occasioned to his own vessel, and is liable to pay compensation for that sustained by another navigated with skill and care; and this liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it.³ This duty arises out of the control of the vessel, and may be transferred with the possession and control of the vessel to another person. Where the vessel ceases to be under the control of the owner, this obligation ceases.⁴

Arise out of control of vessel.

Vessels sunk by accident.

Thus, it has been held, that where a vessel is sunk in a navigable river by accident or misfortune, an indictment will not

¹ L. R., 9 C. P. 62.

² 16 C. B., N. S. 546.

³ *Brown v. Mallet*, 5 C. B. 599; see also *Stubbs v. Hilditch*, 51 J. P. 758; *White v. Phillips*, 15 C. B., N. S. 245; 31 L. J., C. P. 33; 9 L. T. 388; *Dimes*

v. Pelley, 15 Q. B. 276. For Rules of the Sea as to lights, signals, sailing, steering and collisions, see *ante*, pp. 413 *et seq.*

⁴ *White v. Crisp*, 10 Ex. 312.

lie against the owner for not raising it.¹ It was said by Lord Ellenborough at *Nisi Prius*,² that the owner of a vessel sunk in a navigable river is bound to place a buoy over the wreck, and that it is not sufficient to place a watchman near to point out the danger; but in the subsequent cases of *Brown v. Mallet* and *White v. Crisp*, Lord Ellenborough is said to go too far, and to assume in all cases that the owner of a vessel is bound to mark the wreck with a buoy, whereas the law is, that if a vessel be sunk by accident and without any default of the owner or his servant, no duty is ordinarily cast on him to remove it, or use any precaution by placing a buoy or otherwise to prevent other vessels from striking against it, except for so long as he remains in possession and control of it—the liability ceases when the control ceases.

The law on this question of liability is thus stated by Lord Blackburn in the House of Lords in the case of the *River Wear Commissioners v. Adamson*.³

*River Wear
Commis-
sioners v.
Adamson.*

“Property adjoining to a spot on which the public have a right to carry on traffic, is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault and liable to make it good; and he does not establish this against a person merely by showing that he is the owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner. But he does establish such liability against any person who either wilfully did the damage or neglected that duty which the law casts on those in charge of a carriage on land and a ship or float of timber on water, to take reasonable care and to use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage. And if he can prove that the person who has been guilty of either stood in the relation of servant to another and that the fault occurred in the course of the employment, he establishes a liability against the master also; . . . but

¹ *H. v. Watts*, 2 Esp. 675; 5 R. R. 766; see also *The Douglas*, 7 P. D. 151; 51 L. J. Ad. 89; 47 L. T. 502; *The Utopia*, (1893) App. Cas. 492; 62 L. J., P. C. 118; 76 L. T. 47; *Parnaby v.*

Lancaster Canal Co., 11 A. & E. 223.

² *Harmond v. Pearson*, 1 Camp. 515.

³ 2 App. Cas. 743 at p. 767; 47 L. J., Q. B. 193; 37 L. T. 543.

*Orr Ewing v.
Colquhoun.*

from which yard the plaintiff's close had been lately severed; and it was questioned whether such a claim, even by the occupier of the entire premises, would be sustained by proof that goods were brought to the inn along the watercourse in boats not belonging to the occupier, or navigated by his servants properly so called. Lord Blackburn, in *Orr Ewing v. Colquhoun*,¹ says: "The river Leven is an inland stream, and the tide does not flow up to the spot where the piers are erected, and, as is pointed out by the Lord President, the rights of the Crown as regards the soil of the *alveus*, and of the public to navigate, are not the same in such a river as they are in the sea or in a tidal estuary. In the present case, however, there is ample evidence that there had been, at least as long as living memory extended, a user by the public of the navigation in the river during the period of the year when the water was high enough,—that is, according to Mr. Smollett, who was called for the defence, on an average for two-thirds of the year; and the very able counsel who argued for the appellants felt it so impossible to deny that there was evidence of user in this water-way by vessels, such that similar evidence, if the question had been as to user of a land way by carriages, would have established the public right, that he abandoned this point, and I do not think any of the noble and learned lords who heard the argument entertain any doubt that the interlocutor, so far as it finds that the Leven is a navigable river free to the public, and that the defenders have no right to execute works which obstruct the navigation, is right. . . . Now² the public who have acquired by user a right of way on land, or a right of navigation on an inland water, have no right of property. They have a right to pass as fully, and as freely, and as safely as they have been wont to do; but unless there is a present interference with that right, or it can be shown that what is now done will necessarily produce effects which will interfere with that right, there is no *injuria*; and I think that if there be no *injuria*, the foundation of the right to have the thing removed fails."

*Bourke v.
Davis.*

In *Bourke v. Davis*³ it was laid down by Kay, J., that a claim to a highway for boats over a non-tidal stream must be treated as if it were a claim to establish a right of highway on dry land, and that a right of recreation by custom upon the land of

¹ 2 App. Cas. 847.

² *Ibid.* p. 854.

³ 44 Ch. D. 110; 62 L. T. 39.

another cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district.

In this case the river M. was a non-tidal tributary of the Thames. The flow of the M. on its course to the Thames was obstructed by a mill-dam, and in order to bring boats from the Thames on to the part of the M. above the dam, it was necessary to take them out of the water and carry them over private land. The M. above the dam flowed under bridges, first at C. and then at E.; and the part of the river between the bridge at C. and the dam was not a way from one public place to another, had never been used as a water-way except for purposes of pleasure and recreation, and its depth and capacity for boating traffic depended on the existence of the dam. The plaintiff, who was owner of an estate lying on both sides of this part of the M., obstructed the water-way of the river, where it flowed through his land, with posts and chains. The defendant, who was a riparian proprietor, but who had for eight years previously kept boats on a piece of land not belonging to him and let them out for hire, pulled down the obstruction, and justified his act on the ground that this part of the M. was a highway. The plaintiff brought this action for an injunction to prevent his obstruction from being interfered with, and the defendant counterclaimed for an injunction to restrain any hindrance to the passage of his boats. From the evidence it appeared that there had been no maintenance of the water-way by any person, with the exception of dredging by the owner of the mill; that as far back as living memory went there had been boating on this part of the river by the riparian proprietors and their friends; that subsequently by degrees, and at first quite secretly, a few persons living on the bank began to take remuneration for lending their boats, not making any charge, but receiving what the borrower chose to give; that thenceforth the growing practice of boating for pleasure, including fishing, had not been effectively interfered with until the plaintiff put his obstruction across the stream, though notices had been put up near the river warning persons against trespassing in boats for fishing or otherwise; but there was no evidence which could establish any public right of fishing.

Kay, J., says in delivering judgment,¹ "The defendant justifies his acts as one of the public. His case is that the river from Cobham Bridge through Esher Bridge to the paper mills is a

¹ 44 Ch. D. at p. 120.

“highway. He makes no claim for a right of recreation by custom. Such a claim is known to our law, but is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district: *Fitch v. Rawling*;¹ *Earl of Coventry v. Willes*.² For all the purposes of this case the right claimed is similar to a right of highway on land not covered by water. In *Orr Ewing v. Colquhoun*,³ Lord Hatherley, L. C., speaking of the river Leven, a non-tidal river in Scotland, says,⁴ ‘There are two totally distinct and different things; the one is the right of property, and the other is the right of navigation. The right of navigation is simply a right of way.’ Lord Blackburn, in the same case, says,⁵ ‘There was evidence of user in this water-way by vessels, such that similar evidence, if the question had been as to the user of a land-way by carriages, would have established the public right.’ I must treat the claim of the defendant, therefore, as if it were a claim to establish a right of highway on dry land. Now, in the case of such a claim, a very material consideration is, by whom has the roadway been metalled, repaired, and maintained in order. In a dispute as to the alleged right, the answer to this question may be decisive. Here there has been no maintenance of the water-way by anyone, except that the mill owner—I suppose, to ensure the flow of water to his mill—seems to have employed men to dredge out the silt or ballast, as it is called. The width and direction are defined by the banks of the river. I asked during the argument if there was any authority for saying that a lake in private grounds, touched at one point only by a public road, could be subjected to a right which would make it a highway, by persons launching boats from the road and boating on it for pleasure. No such authority has been produced. But reference was made to *Marshall v. Ulleswater Steam Navigation Co.*⁶ That case, however, was one in which the right of navigation in the Ulleswater lake was admitted, although the soil of the bed of the lake was said to be vested in the plaintiff. How the right was acquired does not appear, nor does the actual decision touch any of the questions that have to be decided in this case. The nearest analogy in the case of a

¹ 2 H. Bl. 393; 3 R. R. 425.² 9 L. J. N. S. 384.³ 2 App. Cas. 839.⁴ 2 App. Cas. 846.⁵ 2 App. Cas. 848.⁶ L. R., 7 Q. B. 766.

“way claimed on dry land would be to suppose a tract
 “determined by an avenue of trees some miles long in the park
 “or other land of a private owner, to which there was no public
 “access save from a road crossing it at right angles, and to
 “suppose that persons driving along that road had been
 “accustomed, when they pleased, to turn into one or other part
 “of this avenue and drive up and down it for pleasure. Would
 “that user, however long continued, make that avenue a high-
 “way, or would the legal inference be that such use being merely
 “for amusement had always been permissive, which, of course,
 “could not grow into a right? When it is sought to establish a
 “right by evidence of user it is not enough to say that such a
 “right might be the subject of an actual grant. Lord St.
 “Leonards, L. C., said in *Dyce v. Hay*,¹ that it ‘does not follow
 “‘that, because a right may be granted—that is, because it is
 “‘grantable by law—therefore it may be prescribed for.’ Another
 “important fact is that the way claimed is not a way from one
 “public place to another. In *Campbell v. Lang*,² Lord Cranworth,
 “L. C., said³ that, speaking generally, ‘a public right of way means
 “‘a right to the public of passing from one public place to another
 “‘public place. It was suggested that by the law of Scotland
 “‘there might be a public right of way from a given public
 “‘place, but neither terminating in a public place nor leading
 “‘to a public place. I doubt whether that can be the law of
 “‘Scotland any more than it is the law of England.’ The only
 “portion of the way in dispute in that case was across the park
 “of the appellant to the confluence of the Rivers Clyde and Cart.
 “But the Lord Chancellor said, ‘The abstract question whether
 “‘the confluence of two rivers can be a *terminus à quo*, or a
 “‘*terminus ad quem* of a public right of way, does not, in the
 “‘present case, arise. The question here is as to a public right
 “‘of way, up to and which may extend beyond, the confluence;
 “‘a right to go further on, so as ultimately to reach a good
 “‘*terminus ad quem*.’ I have referred to the report of the case
 “(18 Court Sess. Cas., 2nd series, 1180) where it is stated that
 “the claim was to a footpath to the confluence of the Clyde and
 “Cart, ‘and communicating with a path along the east bank of
 “‘the Cart leading to *Inchinnan Bridge*.’”

As to the question of *culs-de-sac*, Kay, J., says,⁴ “But it is

¹ 1 Macq. 305, 312.

² 1 Macq. 451.

³ 1 Macq. 453.

⁴ 44 Ch. D. at p. 122.

“argued that a *cul-de-sac* may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. Lord Cranworth instances *Connaught Place*, which opens into the Edgware Road; *Young v. Cuthbertson*; ¹ and see *Rugby Charity v. Merryweather*.² But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended. This is one obvious objection to the defendant's claim.”

Obstruction
of, illegal and
a nuisance.

The obstruction of the navigation of non-tidal waters is illegal and a nuisance. “Above the point reached by the flow of the tides,” says Lord Denman in *Williams v. Wilcox*,³ “there was at least a jurisdiction in the Crown, according to Sir Mathew Hale,⁴ to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges and boats.”

Exclusive
right to
carry goods.

It has been held in a late case by the Court of Appeal, reversing a decision of Farwell, J., that it is within the power of the Crown to grant by charter to a subject who has made a river navigable and passable by making locks and sluices, a franchise or exclusive right of conveying goods in boats by means of the navigation. Though the word “toll” was not used in the charter, the public were held entitled to pass through the locks on payment of a reasonable toll, but inasmuch as the charter conferred a monopoly, the owner was bound to maintain and work the locks.⁵

Stirling, L. J., discussing the charter, says:⁶ “I feel bound to say that, in my judgment, the charter is expressed in language appropriate to create a franchise, and that, if the true effect of it be that a valid franchise has been created, it affords a legal origin for the tolls which are proved to have been taken by the plaintiffs and their predecessors in title, as already mentioned. It is, therefore, to be considered whether the Crown could by charter confer on a subject such a franchise. I have been unable to find any case in which a similar charter has been the subject of decision by the Courts. The right to a ferry⁷ has, however, been frequently considered:

¹ 1 Macq. 456.

² 11 East, 375, n.; 10 R. R. 528.

³ 8 A. & E. 333; 47 R. R. 595; see *ante*, pp. 446 *et seq.*

⁴ De Jure Maris, part 1, c. 2, p. 8.

⁵ *A.-G. v. Simpson*, C. A. (1901) 2 Ch. 671. As to “navigation” rights in canals, see *ante*, Chap. V.

⁶ (1901) 2 Ch. at p. 717.

⁷ As to ferries see *post*, Chap. VIII.

“ its general nature is thus explained by Sir M. Hale, at the
 “ beginning of cap. 2 of his treatise, ‘ De Jure Maris ’ (Stuart
 “ Moore’s ‘ History of the Foreshore,’ p. 372): ‘ The King, by
 “ an ancient right of prerogative, hath had a certain interest in
 “ many fresh rivers, even where the sea doth not flow or reflow,
 “ as well as in salt or arms of the sea; and those are these
 “ which follow: First, a right of franchise or privilege that no
 “ man may set up a common ferry for all passengers, without a
 “ prescription time out of mind, or a charter from the King.
 “ He may make a ferry for his own use or the use of his family,
 “ but not for the common use of all the King’s subjects passing
 “ that way; because it doth in consequence tend to a common
 “ charge, and is become a thing of public interest and use, and
 “ every man for his passage pays a toll, which is a common
 “ charge, and every ferry ought to be under a public regulation,
 “ viz., that it give attendance at due times, keep a boat in due
 “ order, and take but reasonable toll; for if he fail in these he
 “ is fineable.’ It is laid down in *Peter v. Kendal*¹ that it is not
 “ necessary that the owner of a ferry should have the property in
 “ the soil on either side of the stream. He must have a right to
 “ use the land on both sides of the water, for the purpose of embark-
 “ ing and disembarking his passengers, but he need not have
 “ any property in the soil on either side. It is sufficient if the
 “ landing-place be a public highway. Now this charter recites
 “ that Spencer had made the river Ouse ‘ navigable and passable ’
 “ within certain limits. This is true in the sense that Spencer,
 “ by making locks and sluices, had made it navigable throughout
 “ those limits, whereas it had been before navigable only in
 “ sections—that is, from mill-dam to mill-dam. Spencer had
 “ erected at the side of each mill-dam, on land belonging to
 “ himself, a lock or sluice; he had a right, as a member of the
 “ public, to pass from mill-dam to mill-dam; he could, by virtue
 “ of his own legal title to the locks and sluices, continue his
 “ passage beyond the mill-dams. The franchise appears to me,
 “ on the true construction of the charter, to be the exclusive
 “ right of conveying goods in boats by means of the navigation
 “ which Spencer had created—that is, the through navigation
 “ rendered possible by the new locks or sluices. This right
 “ closely resembles that of a ferry, and I can see no reason why
 “ it should not be in the power of the Crown to create it. The

¹ 6 B. & C. 703, 710, 711; 30 R. R. 504.

“exercise of the right would impose on the grantee obligations similar to those of a ferryman, as, for example, to attend at the locks at due times, to keep them in proper working order, and to take reasonable tolls. In *Allnut v. Inglis*¹ Lord Ellenborough, C. J., said at p. 588: ‘There is no doubt that the general principle is favoured both in law and justice, that every man may fix what price he pleases upon his own property or the use of it; but if, for a particular purpose, the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms.’ In my judgment, the defendant’s predecessor in title, by applying for and putting in use the charter of 14 Car. I., gave the public the right to resort to the locks and sluices which were his property for the purpose of passing from section to section of the river Ouse, and, inasmuch as the same charter conferred on that predecessor a monopoly for that purpose, he and his successors come under an obligation to perform the duties attached to that monopoly.”

Lakes.

With regard to large inland navigable lakes, it would seem to be doubtful whether such lakes are navigable by the public at common law.² However, there is no doubt that rights of navigation may be acquired and have practically been acquired in all such lakes even where the soil of them is private property.³

The Conservancy of Navigation.

Origin of
conservancy.

Lord Hale says,⁴ that the office of conservancy is of two kinds: 1st, That relating to nuisances in rivers, founded on statute 1 Hen. IV. c. 12, whereby it is enacted that there shall be commissions granted to survey and keep the waters of great rivers, and to correct and amend the defaults; and 2nd, The conservancy relating to fishing, mentioned in the statute 1 Eliz.

¹ 12 East, 257; 11 R. R. 452.

² As to this, see *Bristow v. Cormican*, Ir. R., 10 C. L. 432, per Whiteside, C. J.; 3 App. Cas. 641: *Blomfield v. Johnson*, Ir. R., 8 C. L. C. 8.

³ *Marshall v. Ulleswater Co.*, 3 B. &

S. 732; L. R., 7 Q. B. 582; 41 L. J., Q. B. 41; 25 L. T. 793; *Micklethwaite v. Vincent*, 67 L. T. 225, and *ante*, pp. 105 *et seq.*, 376 *et seq.*

⁴ Hale, de Jure Maris, Harg. Tracts, p. 23.

c. 17, and founded on the *Statute of Westminster* 2, c. 47, for the protection of salmon.¹

The duty of the conservancy of navigation appears to have been entrusted to the Crown as representative of the State. Thus we find that from the earliest times the King, in virtue of his office of Lord High Admiral, was conservator of all ports, havens, rivers, creeks, and arms of the sea, and protector of the navigation thereof;² and, according to Sir M. Hale, there was a jurisdiction in the Crown to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges and boats.³ The wording of the early statutes as to weirs—such as the 22nd chapter of *Magna Charta*, “that all weirs from henceforth shall be utterly put down by Thames and Medway, and through all England, but only by the sea coasts”—is evidence of the nature of this prerogative,⁴ which was, however, delegated to various subordinate authorities, of which the commissioners of sewers were the most important.

Formerly in the Crown.

The origin of commissions of sewers, and the principal points relating to them, so far as they deal with matters connected with the law relating to water, have been treated of in a former chapter.⁵ It will be necessary, however, again briefly to refer to the subject.

Commissions of sewers.

The term “*sewer*” is uncertain as regards its derivation, some maintaining that it is compounded of *seoir*, to sit, and *eau*, water;⁶ others that it means merely to *sue* or *issue*, whence *suera*,⁷ while some again derive it from *sea* and *were*.⁸ Mr. Serjeant Callis⁹ holds it to be diminutive of river, it being a freshwater trench compassed in on both sides with a bank, while in modern Acts it is treated as a general term comprising sewers and drains of

Meaning of the word sewer.

¹ Ibid. By 17 Ric. II. c. 9, also, it is enacted that “justices of the peace be conservators of the statutes touching ‘salmons,’ the statutes there named being 13 Edw. I. c. 47, and 13 Ric. II. c. 19.

² Hale, de Jure Maris, Harg. Tr. p. 23. It was the custom and duty of the kings of England to defend the realm against the sea, as well as against enemies; Woolrych, 12; Callis, 80; *Hudson v. Tabor*, 2 C. P. D. 290 (C. A.); 46 L. J., Q. B. 63; 36 L. T. 492; see *ante*, Chap. I. pp. 34 *et seq.*

³ Ibid.; Lord Denman in *Williams v. Wilcoz*, 8 A. & E. 333; 47 R. R. 595.

Lord Hale says, “The king has an interest of jurisdiction in rivers;” De Jure Maris, 8; Woolrych, 3.

⁴ Cf. chapters xv. and xvi. of *Magna Charta*, which relate to the repairing of banks and bridges, and 12 Edw. I. c. 7; 1 Hen. IV. c. 12; 25 Edw. III. stat. 4, c. 4, &c.; see as to weirs, *ante*, pp. 445 *et seq.*

⁵ *Ante*, Chap. I. pp. 32 *et seq.*

⁶ *Termes de la Ley*; Woolrych, Law of Sewers, 3rd ed. p. 1.

⁷ 4 Inst. 275; Woolrych, Law of Sewers, 3rd ed. p. 1.

⁸ Callis, 80; Woolrych, Law of Sewers, 3rd ed. p. 1.

⁹ Ibid.

every description, except drains connecting houses with cesspools,¹ and includes also a marsh wall or embankment.² Its application seems to be equally wide. Lord Coke states that "There are three manner of statutes which concern sewers. The first consists in maintaining and repairing walls, sewers, &c. The second, in destroying and removing nuisances. The third, which concerns both these points, as well in destroying as in maintaining."³ Lord Holt again says, that commissions of sewers to defend the sea were very ancient, and, even in some cases, by special prescription; but that sewers for melioration of land were by Act of Parliament.⁴

Duties and powers of commissioners.

It was pointed out in the chapter already alluded to,⁵ that the powers of commissioners of sewers are derived from the statutes 6 Hen. VI. c. 5, and, more particularly, from the Act of 23 Hen. VIII. c. 5, which was known as the Bill of Sewers. It will also be remembered that the principal subjects under the jurisdiction of commissions issued under the latter enactment, which was modified and amended by subsequent Acts,⁶ were—1, Sea walls and such like defences; 2, Bridges, trenches, mills, and other things incident to river conservancy, which might in some case prove obstructions; 3, Navigable rivers; 4, Watercourses, streams and pools; and 5, Sewers and gutters. With regard to these, their duty was to maintain such as were useful, and to remove nuisances, while the commissions were temporary in their nature and all amenable to the Crown.

Modern requirements, however, have led to great changes in the nature of these commissions, the inconvenience of the temporary duration of which was soon felt.

Not only are commissions of sewers, when once issued, to be now deemed to continue until such time as they may be superseded by the Crown, and their ordinances made indefeasible, until set aside by subsequent Courts of Sewers;⁷ but many of their functions have been transferred by legislation to various bodies of modern growth.

¹ 11 & 12 Vict. c. 63, s. 2; 18 & 19 Vict. c. 120, s. 250; 38 & 39 Vict. c. 55, s. 4.

² *Poplar Board v. Knight*, 28 L. J., M. C. 37; cf. *Reg. v. Local Board of Godmanchester*, L. R., 1 Q. B. 328; 35 L. J., Q. B. 125; 14 L. T. 104.

³ 10 Rep. 143; Woolrych, 5.

⁴ *The Vill of Shoredam*, 12 Mod. 331; Holt's

Cases, 643; Woolrych, 3; cf. *Hudson v. Tabor*, 2 C. P. D. 290 (C. A.); 46 L. J., Q. B. 63; 36 L. T. 492.

⁵ See *ante*, Chap. I. pp. 34 *et seq.*

⁶ *Inter alia* of such amending Acts may be noted—13 Eliz. c. 9; 3 & 4 Will. IV. c. 22; 24 & 25 Vict. c. 133, s. 14.

⁷ Sect. 14 of 24 & 25 Vict. c. 133.

Thus, their jurisdiction with regard to sewers (using the word in its ordinary sense), drains and nuisances, has been transferred by a series of enactments¹ to the Metropolitan Board of Works and various sanitary authorities as regards the metropolis; while, with respect to the rest of the kingdom, it has been delegated to the Local Government Board, and other authorities of a like nature.

Now vested
in sanitary
authorities

With respect to watercourses, streams and pools, the authority of commissions of sewers has also been vested, so far as the drainage and the improvement of land are connected therewith, in the inclosure commissioners,² who, in addition to their functions under other statutes, are appointed commissioners³ for carrying into execution *The Improvement of Land Act, 1864* (27 & 28 Vict. c. 114), in which the term improvement of land, for which the commissioners are authorized to advance money, is defined⁴ to comprise, *inter alia*, the following works:—

or inclosures
commis-
sioners,

1. The drainage of land, straightening, widening, deepening, or otherwise improving drains, streams, and watercourses of any land:

2. The irrigation and warping of land:

3. The embanking and weiring of land from the sea and tidal waters, or from lakes, rivers, or streams, in a permanent manner:

* * * * *

10. The construction of engine houses, water-wheels, saw and water mills, &c., conduits, watercourses, bridges, weirs, sluices, flood-gates, &c. which will increase the value of lands for agricultural purposes:

11. The construction or improvement of jetties or landing-places

¹ The principal Acts relating to *sanitary matters* in the metropolis, are—11 & 12 Vict. c. 112; 12 & 13 Vict. c. 93; 18 & 19 Vict. c. 120; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102; 35 & 36 Vict. c. 79 (Public Health Act, 1872), s. 57; 38 & 39 Vict. c. 55 (Public Health Act, 1875), ss. 108, 115, 291. The principal Acts relating to *sanitary matters* in *England, exclusive of the metropolis*, are—11 & 12 Vict. c. 63; 18 & 19 Vict. c. 116; 21 & 22 Vict. c. 97; 21 & 22 Vict. c. 98; 28 & 29 Vict. c. 75; 30 & 31 Vict. c. 113; 34 & 35 Vict. c. 70 (The Local Government Board Act, 1871); 38 & 39 Vict. c. 55 (Public Health Act, 1875); 38 & 39 Vict. c. 31, and 39 & 40 Vict. c. 31 (The Public Works

Loans Act, 1875 and 1876).

² The principal statutes on this point are—10 & 11 Vict. c. 38 (Drainage Act, 1847), which incorporates the powers of 8 & 9 Vict. c. 118 (An Act to facilitate the Improvement and Inclosure of Commons); 24 & 25 Vict. c. 133 (Land Drainage Act, 1861); 27 & 28 Vict. c. 114 (Improvement of Land Act, 1864), which refers to and recites 12 & 13 Vict. c. 100 (Private Money Drainage Act, 1849); 19 & 20 Vict. c. 9, as well as 1 & 2 Will. IV. c. 33; and 5 & 6 Vict. c. 89, which relate to land improvement in Ireland.

³ By sect. 2.

⁴ By sect. 9.

on the sea coast, or on the banks of navigable rivers or lakes, for the transport of cattle, sheep and other agricultural stock and produce, of lime, manure and other articles and things for agricultural purposes; provided that the commissioners shall be satisfied that such works will add to the permanent value of the lands to be charged to an extent equal to the expense thereof: and

12. The erection of all such works as in the judgment of the commissioners may be necessary for carrying into effect any matter hereinbefore mentioned, or for deriving the full benefit thereof.

or in conservancy boards.

Lastly, the powers of commissioners of sewers over navigable rivers have now devolved almost entirely on various conservancy boards created by statute for each particular river.¹

Since, therefore, commissioners of sewers may be created by Act of Parliament, independently of any general commission,² it may be apparently laid down, that whenever the legislature authorizes a body of persons, and constitutes them a body corporate, in order to deal with matters properly under the control of commissioners of sewers, such body is constituted thereby a commission, unless there is a stipulation to the contrary in their particular Act.

Conservancy boards have all the powers of commissioners of sewers.

Thus the Bristol Dock Company were not only authorized to make sewers, but had also considerable powers entrusted to them to enable them to carry out the duties imposed on them;³ and it appears to be customary to insert clauses in modern Acts of

¹ See 21 Jac. I. c. 32; 24 Geo. III. c. 8, and more fully *post*, pp. 477 *et seq.*, and p. 474, note 3.

² Woolrych, 49.

³ 6 B. & C. 181. The company were empowered by their Act to make a floating harbour at Bristol, and it was also enacted "that it should and might be lawful for the directors of the Bristol Dock Company, and they were therefore authorized and required to make a common sewer in a certain direction therein specified and also to alter and reconstruct all or any of the sewers of the said city at the mouth thereof, so and in such manner that the sewers might be discharged considerably under the surface of the water in the floating harbour, and also to make such other alterations and amendments in the sewers of the said city as might or should be necessary in consequence of the floating of the said

"harbour." The directors altered several sewers so as to discharge them considerably under the surface of the water in the floating harbour; but the sewage there discharged was so offensive as to be a nuisance to the neighbourhood. Held that under the latter part of the clause above set forth, the directors were authorized and required to make a new sewer if necessary to remove the nuisance. It was also held that a writ of *mandamus* commanding the directors "to make such alterations and amendments in the sewers as were necessary in consequence of the floating of the said harbour," was in the proper form; and that it was neither requisite nor proper to call upon the company to make any specific alteration, the mode of remedying the evil being left to their discretion by the Act of Parliament.

Parliament to preserve entire the rights of various commissions of sewers. So sect. 61 of 3 & 4 *Will. IV. c. 22*, provides that the Act shall not interfere with any navigable river, canal, port, or harbour under the management or power of any commissioners, trustees, or proprietors by virtue of any local or private Act of Parliament; sect. 72 of 21 & 22 *Vict. c. 98*, empowers any corporation, &c., authorized under an Act of Parliament to navigate on any river, canal, or harbour, &c., and to alter sewers, providing others at their own expense; and sect. 68 of the same Act (*The Local Government Act, 1858*) enacts that the local board shall not interfere with any rivers, canals, harbours, docks, &c., so as injuriously to affect the navigation thereon or the use thereof, or interfere with any towing-path so as to interrupt the traffic thereof, in cases where any corporation, company, commissioners, conservators, &c., or individuals, are by virtue of any Act of Parliament entitled to navigate on or use such river, canal, dock, or harbour, &c., or to take tolls for its use.¹

As early as the reign of Ric. II. the conservancy of the Thames was entrusted to the mayor and corporation of London by the statute 17 *Ric. II. c. 9*,² and by 9 *Hen. VI. c. 9*, the Chancellor of England was empowered to grant his commission to certain persons to scour and amend the river Ley, in the counties of Essex, Hertford and Middlesex.³

Conservancy
of the
Thames.

The obstruction of water channels made from time to time, for public or private convenience, was a grievous offence punishable by action or indictment, according to the nature of the wrong;⁴ and, among the reasons assigned by sect. 1 of 23 *Hen. VIII. c. 5*, for the appointment of the commissioners of sewers, are "the overflowings . . . of land waters and springs

Powers of
commis-
sioners of
sewers and
conservancy
boards to
remove
obstructions.

¹ See Woolrych, *Law of Sewers*, 3rd ed. (1864), pp. 49—53. See, too, sect. 62 of 3 & 4 *Will. IV. c. 22*; sects. 15, 16, 17, and 18 of 4 & 5 *Vict. c. 45*; sect. 18 of 10 & 11 *Vict. c. 38*; sect. 43 of 11 & 12 *Vict. c. 63*; and sects. 54, 55, 57, 60 of 24 & 25 *Vict. c. 133*.

² Hale, de Jure Maris, Harg. Tracts, p. 23.

³ This Act recites 23 *Edw. III. stat. 4*; 1 *Hen. V. c. 2*, and 3 *Hen. VI. c. 5*, the latter statute being enacted for the improvement of the navigation of the sea. By an Act of the same reign, 9 *Hen. VI. c. 5*, "all men shall have free passage in "Severn with goods, chattels, &c."—a slightly different species of conservancy. It recites that the river of Severn is

common to all the king's liege people, &c.; that divers Welshmen and others persons "arrayed in manner of war," have destroyed boats, &c., and thereby injured navigation; and that, therefore, it is ordained (sect. 3) by authority of Parliament that the said liege people of the king may have and enjoy their free passage in the said river, &c., without disturbance of any, &c.; parties aggrieved to have action, according to the course of the common law (sect. 4). Further provision on the same subject is made by 19 *Hen. VII. c. 18*; and 23 *Hen. VIII. c. 12*.

⁴ Woolrych on Sewers, 1, 2; Callis, 80; cf. *Hudson v. Tabor*, 2 C. P. D. 290 (C. A.); 46 L. J., Q. B. 463; 36 L. T. 492.

"upon meadows, pastures and other places," and "the obstructions created by mills, mill-dams, weirs, &c. . . . upon rivers and watercourses."¹ The commissioners of sewers had, therefore, powers of removing obstructions in navigable rivers; though it appears according to Woolrych that they have no power to improve the navigation of a river, or to make a river navigable which was not so before, and that their power has never been extended beyond the removal of existing obstructions, or, at the most, the erection of new defences, which might in some degree be beneficial to the traffic.²

In progress of time, we find that the conservancy of nearly all the rivers, ports and harbours in England, was gradually placed in the hands of corporate bodies so constituted by Act of Parliament, and exercising the functions of permanent commissions of sewers; though it would appear that the authority of the commissioners of sewers over such bodies may still be retained, if provision to that effect is expressly made in the Act incorporating them.³ The conservators of the various rivers of this country, therefore, perform in a fuller manner a portion of the duties originally devolving on the commissioners of sewers. A general definition of the scope of their powers may be to some extent drawn from the remarks of Cairns, L. C., with regard to the functions of the Conservators of the Thames in *Cory v. Bristowe*:⁴ "The Conservators of the Thames, under the Act of 1857,⁵ are made the guardians, as it were, of the navigation of the Thames, and the protectors of the bed and soil of the Thames, for the purposes of navigation. They have certain powers for making bye-laws to protect the navigation—they have powers to make piers and landing-places for the accommodation of the public—they have powers to authorise riparian owners to make landing places, wharves and jetties, and to put down mooring-chains, and moorings for the better and more convenient enjoyment and access to their lands."⁶

¹ See *ante*, Chap. I. p. 32.

² Woolrych on Sewers, p. 125. Rivers are placed under the jurisdiction of the commissioners by sects. 2, 3, and according to the definition of a river given by Serjeant Callis (p. 77) in his work on Sewers, *all* rivers would seem to be meant. Modern decisions however appear to have limited the term to such as "are necessary to or useful in navigation": *Yeaw v. Holland*, 2 Sir W.

Blackstone, 717; and per Buller, J., in *Dore v. Gray*, 2 T. R. 365; 1 R. R. 494. See *ante*, Chap. I. p. 32.

³ See Woolrych on Sewers, p. 49, and *ante*, Chap. I. p. 33.

⁴ L. R., 2 App. Cas. 262; 46 L. J., M. C. 273; 36 L. T. 595.

⁵ 20 & 21 Vict. c. 147.

⁶ By a public Act passed in the reign of Henry VIII. the corporation of the city of Exeter are empowered to remove

The statutes relating to inland water navigation are of three kinds : 1st, such as restore or improve the navigation of rivers formerly navigable ; 2nd, such as make rivers navigable which originally were not so ; and, 3rd, such as provide for the construction of an inland navigation or canal. Under the first two classes of Acts the care and conservancy of a river is vested in commissioners, the mayor and burgesses of a town, or some other body corporate. Powers are given them to dredge, cleanse, and scour the bed of the stream, and generally to keep it navigable ; to make and enforce bye-laws regulating the navigation ; to remove obstructions, and, where necessary, to enter on to lands, making compensation for interests injured by their acts.¹

Statutes relating to navigation of inland waters are of three kinds.

By the Thames Conservancy Acts, the soil of the bed of that river up to high water mark, which had long been the subject of dispute between the Crown and the corporation of the city of London, is vested in the latter body, who in their turn convey all their interest and title therein to the conservators appointed by the Act.² But it has been held that where a river or navigation has been by Act of Parliament vested in a board of conservators for the purposes of navigation, if the words of the Act are applicable to the acquisition by the conservators of the right or easement of passage only, and where the acquisition of the soil of the river and its banks is not necessary for the purposes of the Act, the ownership of the soil must be taken not to pass—the Courts not being inclined to infer that a statute of this kind gives more than such a use of the soil as is necessary for the

Soil of rivers not generally vested in conservators by their Act.

obstructions to the navigation of the river Exe, paying compensation to the owners of the soil where the obstructions were situated :—*Held*, first, that this Act did not confer the conservancy of the river on the corporation ; secondly, that it did not entitle the corporation to file a bill in equity to restrain the erection of a pier in the river ; and, thirdly, that it did not confer any right or privilege on the corporation within the meaning of sect. 14 of the General Piers and Harbours Act, 1861, so as to prevent the erection of a pier in the river without their consent being obtained : *Exeter Corporation v. Deron (Earl)*, L. R., 10 Eq. 232 ; 23 L. T. 382.

¹ 16 & 17 Car. II. c. 12 (Avon (Hampshire) Navigation) ; 24 Geo. II. c. 39 (Avon (Warwickshire) Navigation) ; 24 Geo. II. c. 19 (Nar Navigation) ; 21

Jac. I. c. 3 ; 24 Geo. II. c. 28 ; 15 Geo. III. c. 4 (Upper Thames Navigation) ; 23 Geo. III. c. 48 (Trent Navigation) ; 2 & 3 Vict. c. 61 (Shannon Navigation) ; 31 & 32 Vict. c. cliv. (Lee Navigation). The only difference between rivers of which the navigation is restored, and those which are made navigable for the first time, is, that in the latter the rights of the conservators, as against the public, are greater, owing to the fact that none of the rights subsisting in a navigable river can attach thereto : *Hargreaves v. Diddams*, L. R., 10 Q. B. 582 ; 44 L. J., M. C. 78 ; 32 L. T. 600 ; *Musset v. Burch*, 35 L. T., N. S. 486 ; *Reg. v. Betts*, 16 Q. B. 1022.

² 20 & 21 Vict. c. cxlvii. ; 57 & 58 Vict. c. 187, *post*, pp. 477 *et seq.* ; see also *Cory v. Britow*, 2 App. Cas. 262 ; 46 L. J., M. C. 273 ; 36 L. T. 595 ; and cases *ante*, Chap. II. pp. 89 *et seq.*

purposes of navigation.¹ Where the words of the Act amount to a statutable conveyance of the soil upon which the navigation is constructed, the land used for the works has been held to vest in the navigation company without any conveyance.²

Where an Act for making the river Tone navigable named thirty persons and their successors as conservators, and provided that lands taken were to vest in them and their successors, and that land might be conveyed to them and their successors, &c. :—Held, that as it was the manifest intention that the conservators should take land by succession, and not by inheritance, although they were not created a corporation by express words, they were so by implication, and might sue in their corporate name for injury done to their real property.³

Conservators
not liable for
damage
caused to ad-
joining lands
in the absence
of negligence.

There appears to be no liability at common law on the owner of the bed of a navigable river to keep the channel clear of natural obstructions, such as the silting up of the channel, or the growth of weeds.⁴ It has, moreover, been held that where the navigation of a river is vested in a body of conservators for the purposes of navigation only, no action will lie against them for damage done by overflow of the river caused by natural obstructions in it, although tolls are taken for the use of the navigation. The only duties cast on them are to protect the navigation, and they are not charged with any liability in respect of matters not essential to the improvement of the navigation.⁵ Thus, in *The Parrett Navigation Co. v. Robins*,⁶ a navigation company was held not liable to the Court of Sewers for not cutting weeds in the river, which were beneficial to the navigation, though injurious to the adjoining landowners—although

¹ *River Lee Conservancy v. Button*, 12 Ch. D. 383; *Badger v. Yorkshire Railway*, 5 Jur., N. S. 409; *Hollis v. Goldfinch*, 1 B. & C. 206; 25 R. R. 357; see also *R. v. Aire and Calder*, 9 B. & C. 820; 33 R. R. 344; *R. v. Mersey and Irwell*, 9 B. & C. 95; 33 R. R. 591; *R. v. Thomas*, 9 B. & C. 114; 32 R. R. 601; *Chelsea Water Co. v. Bowley*, 17 Q. B. 358; *Doe d. The Queen v. Archbishop of York*, 14 Q. B. 81; *Doe d. Patrick v. Beaufort*, 6 Ex. 498; *Somerset Canal v. Harcourt*, 2 De G. & J. 596; *Robinson v. Warwick*, 2 Bing., N. C. 488; *Harbrough v. Shadlow*, 7 M. & W. 37; *Dimes v. Grand Junction Canal*, 3 H. L. 794; *Simpson v. Staffordshire Water Co.*, 4 De G. & J. 679; *Doncaster Union v. Manchester, S. and L. Rly.*, 71

L. T. 585—H. L. (E.); 6 R. 280.

² *Bruce v. Willis*, 11 A. & E. 463; see also *R. v. Mersey and Irwell*, 9 B. & C. 95; 32 R. R. 591; *R. v. Thomas*, 9 B. & C. 114; 32 R. R. 601.

³ *Conservators of the Tone v. Ash*, 10 B. & C. 349.

⁴ *Hodgson v. Mayor of York*, 28 L. T., N. S. 836; *Bridge's case*, 13 Rep. 33; see also *Forbes v. Lee Conservancy*, 4 Ex. D. 116.

⁵ As to liability of trustees of a navigation for damage caused by a ship to a ferry which was not part of their undertaking, see *Clyde Navigation Trustees v. Lord Blantyre*, (1893) App. Cas. 703, H. L. (Sc.).

⁶ 10 M. & W. 593.

they took tolls for the navigation. So in *Hodgson v. Mayor of York*,¹ where the plaintiffs were authorized to abandon a river navigation, and did so, making alterations authorized by the Act, the effect of which was that if the channel remained in the state they left it in, due provision was made for the escape of the water—but they took no measures to prevent the channel from silting up—it was held that they were not responsible for damage caused by the silting up of the channel or growth of weeds causing damage to adjoining proprietors.

In *Cracknell v. Mayor and Corporation of Thetford*,² the defendants were empowered by a private Act of Parliament to render navigable the river Brandon, and to take tolls for the purpose of repaying the necessary expense; and in the exercise of their power under the Act they erected staunches in the river, the result of which, combined with the natural growth of the weeds in the river, and the accumulation of silt against the staunches, was that the river overflowed its banks and damaged the plaintiff's land. It was held that there was no obligation on the defendants to cut the weeds or dredge the silt unless it was necessary to do so for the benefit of the navigation; and that the plaintiff's remedy, if any, was not by action against them for not doing so, but by applying for compensation under the Act.

In support of the plaintiff the cases of *Whitehouse v. Fellows*,³ *Mersey Dock Trustees v. Gibbs*,⁴ and *Bagnal v. London and North Western Railway*,⁵ were cited as well as *Fletcher v. Rylands*⁶ and *Groucott v. Williams*.⁷ The Court, however, held, that none of these cases applied; Brett, J., saying: "I think this case is clearly within the authority of *Parrett Navigation v. Robins*,⁸ and distinguishable from those in which it has been held that, if a man elects to do an act on his own land, he must take care that he does it so as not to cause damage to his neighbours. Here the defendants are not owners of the land, and they have only done acts which they were authorized to do. I think, therefore, the plaintiff's only remedy, if any, is for compensation under the Act." "In order to enable the plaintiff

¹ 28 L. T., N. S. 836.

² L. R., 4 C. P. 629. See remarks on this case by Lord Hatherley in *Geddis v. Bunn Reservoir*, 3 App. Cas. 430, ante, Chap. V. p. 270.

³ 10 C. B., N. S. 765; 30 L. J., C. P.

305.

⁴ L. R., 1 H. L. 93.

⁵ 7 H. & N. 423; 31 L. J., Ex. 480.

⁶ L. R., 1 Ex. 265.

⁷ 4 B. & S. 149; 32 L. J., Q. B. 237.

⁸ 10 M. & W. 593.

"to maintain this action," said Bovill, C. J., "there must be shown some duty or obligation on the defendants which they have omitted or neglected, or in the performance of which they misconducted themselves or acted negligently; and that by reason of their negligence damage has accrued to the plaintiff. It seems to me that no such conduct on the part of the defendants has been made out."¹

But where river commissioners are by their Acts under an obligation to maintain and repair sea walls, they will be liable for damage caused by an overflow not only to lands reclaimed by them, but to lands adjoining such lands.²

Conservators not bound at common law to keep the navigation in proper repair, but so long as they keep it open and take tolls, they are bound to use reasonable care.

Parnaby v. Lancaster Canal.

It would seem, also, that at common law, independent of statute, neither the owners of a navigation or board of conservators are bound to keep the navigation open or in a proper state of repair, but that so long as they choose to keep it open and take tolls for its use, even where such tolls are not for their own profit, but solely for the maintenance of the navigation, they are under an obligation to take reasonable care that persons using it are exposed to no undue danger.³ Thus, in *Parnaby v. Lancaster Canal*,⁴ the Court of Exchequer Chamber held, affirming the Court of Queen's Bench, that a canal company were liable at common law for damage caused by a sunken boat which they had failed to weigh up or mark by light or signal independent of any statutory clause enabling them so to weigh up sunken boats—on the principle that the owners of a canal taking toll for the navigation are bound to take reasonable care in making the navigation secure.

Mersey Docks v. Gibb.

In *Mersey Docks v. Gibb*,⁵ the House of Lords held that this principle applied to a private person or company taking tolls for the use of statutory works, even where such tolls were not

¹ Under the River Weaver Navigation Acts, persons who sustain damage by reason of the navigation are entitled to compensation. In *Reg. v. Delamere* (13 W. R. 757), the defendants had under their control a lock, weir and clows, through which, when raised, the water could be let off. During a flood they kept down the clows, and by so penning back the water caused the premises of plaintiff to be damaged, and the plaintiff was held entitled to compensation; for although it was not shown that his premises would not have been flooded in the same way if the river had never been altered, still the proximate cause of the damage, viz., the penning back, being a thing done on account of the navigation

—the trustees were as much liable as if it had been a breach of duty, and it was no excuse that it was done skilfully, and that unless it had been done, other lands would have been damaged.

² *Bramlett v. Tees Conservancy*, 49 J. P. 214.

³ *Parnaby v. Lancaster Canal*, 11 A. & E. 223; see *ante*, Chap. V. p. 303; *Mersey Docks v. Gibb*, L. R., 1 H. L. 93; *Winch v. Conservators of Thames*, L. R., 9 C. P. 378; L. R., 7 C. P. 458; see also *Brownlow v. Metropolitan Board of Works*, 13 C. B., N. S. 768; 33 L. J., C. P. 33.

⁴ 11 A. & E. 223.

⁵ L. R., 1 H. L. 93; 35 L. J., Ex. 225; 14 L. T. 677.

applicable to the use of the individual or company, but were to be devoted to the maintenance of the works; and that the Mersey Dock Company were responsible for damage caused to a ship which, on entering the docks, struck on a mud bank which the defendants neglected to remove. Their Lordships held further, that if knowledge of the existence of a cause of mischief make persons responsible for an injury, they will be equally responsible where, by their culpable negligence, its existence is not known to them.¹

In the case of *Winch v. The Conservators of the Thames*,² an action was brought by the plaintiff for damages for the loss of some horses which were drowned while towing a barge on the river Thames above high water mark, in consequence of a part of the towing-path being out of repair. The defendants, the Conservators of the Thames, were a corporate body in whom were vested by *The Thames Navigation Act, 1866* (29 & 30 Vict. c. 89), certain powers for the preservation and improvement of the stream. It appeared from earlier statutes that there were originally towing-paths on the river banks, the owners of which took tolls for the right of passing along them, and that the defendants had acquired powers of supervising and controlling the towing-paths and regulating the tolls. They subsequently acquired powers to purchase and take lands compulsorily, and to execute works for the purposes of the navigation, and to take tolls for the use of the towing-paths purchased or hired by them, and to apply their funds to the repair of the works vested in or acquired or constructed by them under their various Acts. The defendants had, in pursuance of the above powers, made a parol arrangement with the owner of the soil of the towing-path, at the place in question, for the use of such towing-path at a yearly rent. Some parts of the towing-path along the river had been specially constructed by and belonged to the defendants, and the use of the whole of the remainder had been acquired by them. They took an aggregate toll for the use of the whole of the navigation and towing-path at Teddington Lock. The Court of Exchequer Chamber held, affirming the decision of the Court of Common Pleas, that the defendants were liable.

*Winch v. The
Conservators
of the Thames.*

The judgment of the Court, read by Bramwell, B., is as

¹ For further cases as to liability of dock and harbour authorities, see *ante*, pp. 331 *et seq.*

² L. R., 9 C. P. 378; L. R., 7 C. P. 456; 43 L. J., C. P. 167; 31 L. T. 128.

follows:¹ "The defendants' rule in this case was to enter a verdict for them on the ground 'that there was no evidence 'that they were bound to repair the spot where the accident 'happened.' If this were the question in the case, it might be difficult to answer it adversely to the defendants—and say that they were bound to repair the spot in question. For undoubtedly when the towing-paths were in the hands of, and the tolls were taken by private owners, there was no such obligation, and none is imposed by the statutes in express terms on the defendants; and it may be, that if the defendants, as a matter of judicious use of their funds, might think it inexpedient to be at what might be the enormous and unprofitable expense of repairing long extents of towing-paths where there was scarcely any traffic, there is no power compelling them, or they would not be compelled to such enormous outlay. We do not go further into this question, as we think it is not the question; but we refer to the judgment in *Mersey Docks v. Gibb*.² But we think it is enough to support this verdict, if the defendants were, so long as they kept the towing-path open and took tolls for its use, under an obligation to those whom they invited to use it, to take reasonable care to see that the towing-path was in such a state as not to expose those using it to undue danger. If the dangerous state of the path at the spot had been latent, so that the defendants, though using reasonable care, remained ignorant of it, or if, having found it out, they had warned the plaintiffs of it, they would not have neglected this duty; but, as it is, if such were the duty of the defendants, the finding of the jury (which we must here take to be correct) is, that they have neglected it. We agree with the Court below in thinking that since the case of *Mersey Docks v. Gibb*,² we must hold the funds of this corporation (although established for public purposes) liable to make good the damages sustained by a private person from any breach of duty on their part,³ and that there is nothing in these statutes to exempt this corporation from the duties which the common law would cast upon

¹ L. R., 9 C. P. p. 387; see also the judgment of the Court below, L. R., 7 C. P. p. 462, where the statutes and cases are discussed at length.

² L. R., 1 H. L. 93; 35 L. J., Ex. 225; 14 L. T. 677.

³ As to this, see also *Itchin v. South-*

ampton, 8 E. & B. 301; *Ward v. Lee*, 7 E. & B. 426; *Clothier v. Webster*, 12 C. B., N. S. 790; *Ruck v. Williams*, 3 H. & N. 308; *Whitehouse v. Fellows*, 10 C. B., N. S. 765; *Brownlow v. Metropolitan Board*, 16 C. B., N. S. 546; 13 C. B., N. S. 768.

“a private person or trading corporation who maintained a similar towing-path along a public navigation, and levied tolls for its use. And we think that *Parnaby v. Lancaster Canal Co.* and *Mersey Docks v. Gibb* establish that such a duty is by common law cast upon those who invite persons to use a towing-path like this, and receive pay for the use of it. It was argued that these cases were not applicable, because the part of the towing-path where the accident happened was on the natural soil, only worn into a track made by the horses’ feet leading from a bridge over one ditch to a bridge over another; and it was argued that the common law only imposed this duty on those who maintained artificial works, such as canals, or docks, or bridges. We wish to guard against being supposed to decide that in every case where a licence is given for money to go over land in its natural state, this obligation results. Much may depend on the circumstances of each case. But we think that in this case, where persons pay one toll for the use of one entire towing-path, parts of which are artificial and parts not, there can be no distinction made as to the duty of those who maintain the parts to take reasonable care of the artificial and the natural parts, or at least to warn those who are there of defects in them. The defendants can in future, if they think fit, announce to those who pay the tolls that they must take the paths as they find them. If this is done, there could be no liability for a defective state of repair, even though wilful. Whether if they gave such notice, and left the banks unrepaired, they could be compelled to repair them, is a question that could then be directly raised and decided.”

In a subsequent case,¹ it has been held by Pollock, B., that where the defendants, an unpaid body of trustees for the river Lee, were expressly forbidden to take any tolls for such part of their navigation as lay between Bow Creek and Old Ford Lock—this part being an ancient navigable river—no duty was imposed upon them to remove obstructions in that part of the navigation; and that, consequently, the plaintiff, owner of a barge which was injured by striking on some submerged piles there, could not recover damages, although the jury found that the piles were dangerous, and that the defendants ought to have been aware of the danger, and had neglected their duty.

*Forbes v. Lee
Conservancy.*

¹ *Forbes v. Lee Conservancy*, 4 Ex. D. 116.

Canals.

The third class of statutes, those relating to canals, are nearly identical as far as the preservation of navigation, and compensation to persons injured by their works, are concerned, but the undertakers are bound, in most cases, to construct the canal in accordance with plans approved by and deposited with the Admiralty, the Board of Trade, or some other competent authority, and the public being only entitled to navigate its waters on payment of tolls, the regulations on the latter head are more stringent and detailed.¹

The duties of the owners of canals, which are in general artificial erections, or excavations on the land of others, will be necessarily larger than those of river conservators as to liability for the escape of water. This subject, however, has been fully treated of in another chapter.²

It is hardly necessary to say, that it would be impossible to state at length the provisions of the numerous River Conservancy Acts³ now in force, and on which the rights and duties of

¹ See 43 Geo. III. c. 102 (Caledonian Canal); 33 Geo. III. c. 80 (Grand Junction Canal); 32 Geo. III. c. 102 (Canal from Pont Newydd to the Usk).

² *Ante*, Chap. V.

³ A consideration of the following extracts from a few of the Acts relating to conservancy will serve to indicate the general nature of their provisions.

I. *Rivers (made navigable).*

16 & 17 Car. II. c. 12.

"An Act for making the river of 'Avon navigable from 'Christchurch in 'the city of New Sarum."

Commissioners to be appointed for making the river navigable. Satisfaction to parties endamaged in any of their lands. Commissioners empowered to compound with persons so damnified. The powers of the said commissioners defined. How commissioners dying or renouncing may be supplied. The powers to make orders and constitutions, and to impose penalties on the breakers. Persons grieved may apply to the justices of assize. The undertakers to have the taxes upon carts, carriages, &c. Penalties, and how to recover the same. Drawing and haling of barges, &c. upon the banks provided for. No wharf to be within New Sarum. The river, havens, &c. to be under the survey of the undertakers and commissioners. Persons sued for action upon this Act may plead the general issue.

Among the private Acts of the same

year are:—"An Act to enable Henry 'Lord Loughborough to make the river 'and sewer navigable from or near 'Bristow Causeway, in the county of 'Surrey, to the river Thames;" "An 'Act for making the river of Medway 'navigable in the counties of Kent and 'Sussex;" "An Act for making divers 'rivers navigable or otherwise passable 'for boats, barges, and other vessels."

31 Geo. III. c. 66, is "An Act to 'enable the Earl of Egremont to make 'and maintain the river Rother navigable from the town of Midhurst, in a 'certain meadow called the Railed 'Pieces or Stopham meadow in the 'parish of Stopham, and a navigable 'cut from the said river to the river 'Usk, at or near Stopham bridge, in 'the county of Essex, and for other 'purposes."

II. *Rivers (navigation improved).*

23 Geo. III. c. 48.

An Act for improving the navigation of the river Trent from a place called Wilden Hay, in the counties of Derby and Leicester or one of them, to Gainsborough, in the county of Lincoln; and for empowering persons navigating vessels thereon to hale the same with horses.

Recites 10 & 11 Will. III. c. 20 (An Act for making and keeping the river Trent, in the counties of Leicester, Derby and Stafford, navigable), that the navigation would be expedited if power

were given to "hale with horses boats, "barges, keels, and other vessels navigated upon the said river," which now are haled on by men; and that several persons, hereinafter particularly named, are desirous of making and maintaining the navigation at their own costs.

It therefore appoints and incorporates the undertakers, and describes the manner in which the navigation shall be made.

No weirs or dams to be made across or in the river, so as to prejudice fisheries, or obstruct the passages of salmon or other fish. Communications between the river Trent and other navigations to be preserved. Lands may be entered to take surveys. Commissioners may lower fords to 24 inches if necessary, and ferry boats are to be provided at the fords. Haling-paths to be made pursuant to the plans. Bodies politic empowered to sell lands. Conveyances to be enrolled, and true copies to be allowed to be evidence. Provisions are made for the raising of money, allotment of shares, and levying of tolls, from which materials for roads and manure for land are to be free, as are pleasure boats. Tolls may be lessened, and may be free from taxes. River not to be under commissioners of sewers. Persons haling, &c. committing any trespass to be subject to penalties.

2 § 3 *Vict. c. 61.*

"An Act for the improvement of the "navigation of the river Shannon" (1839).

Sect. 1 recites 5 & 6 Will. IV. c. 67, whereby it was enacted, that commissioners should be appointed by her Majesty's Treasury for the purpose of ascertaining the works necessary for the improvement of the said navigation, and for making an estimate of the expense thereof; and enacts, the works described in the plans and reports of the commissioners shall be carried into effect.

Commissioners may make contracts for works (sect. 16); and are to lay their accounts before Parliament (sect. 18). Where they have doubts as to the legality of mills, &c., they may apply to Court of Chancery or Exchequer to direct proceedings to ascertain legality (sect. 21), and may abate nuisances, such as mills, mill-dams, weirs, &c. By sect. 37, the care and conservancy of the river, and of such rivers as flow into it, is vested in the commissioners. No weirs or other obstructions shall be placed in the navigation without their consent (sect. 38); and they shall cause the limits of the river to be defined

(sect. 39); and surveys and maps of the mills and all weirs and dams thereon, to be made (sect. 40). They may erect beacons and lighthouses (sect. 41). By sect. 42 it is enacted, "That the commissioners for the execution of this Act shall have full power to widen or "deepen, cleanse, clear, or scour, open or "straighten, and to remove all obstructions in the opinion of the said commissioners injurious to the navigation "thereof respectively, from the said "river Shannon, or any of the canals or "rivers aforesaid, by any ways or means "which to them shall seem expedient; "and to make or erect in or on the said "river, or in or on any of the rivers "aforesaid, or upon the lands adjoining "or contiguous to the same, or any of "them, such and so many weirs, dams "or engines, landing-places, or other "matters or things for the purpose of "improving the navigation of the said "river, or any of the rivers aforesaid, &c." They may sell or demise lands, mill sites, &c. (sect. 44); take tolls, &c. (sects. 45, 47); and fix rates of wharfage and quays (sect. 48). They may make bye-laws (sect. 56), copies of which are to be evidence.

[37 & 38 *Vict. c. 60* (1874), in some respects amends this Act, and is incorporated with it. By sect. 1, the Acts of 1835, 1839, 1846 and 1874, may be cited as the Shannon Acts, 1835 to 1874.]

13 § 14 *Vict. c. lxxiii.*

"The Tyne Improvement Act, 1850."

Sect. 34. "The commissioners from "time to time, if and when they deem it "necessary or expedient, may build, "purchase, hire and employ such vessels "to be worked by steam or otherwise, at "their discretion, for dredging, scouring, "cleansing and deepening the bed of the "river as far as they lawfully can or "may, and such other vessels and machinery to be used for any other of the "purposes of this Act as they think fit, "and may use such vessels accordingly."

Sect. 35. They are to cause maps of the port, showing shoals, banks, levels of high and low water, quays, wharves, to be made and deposited in their office, and open to inspection.

31 § 32 *Vict. c. cliv.*

"Lee Conservancy Act, 1868."

Recites that a large proportion of the water supplied to the metropolis is drawn from the Lee, and the Lee is extensively used for purposes of navigation, and for these and other reasons the preservation of the purity of the water of the Lee and its tributaries, and

the improvement of the stream, bed, and banks thereof, and the maintenance and improvement of the cuts, locks, and other navigation works on the Lee, are objects of great public and local importance; that there is not any existing authority with sufficient powers for effecting such preservation, maintenance, and improvement in all respects, and it is expedient that a new body of conservators, with adequate powers, be constituted for that purpose, and that under the Lee Navigation Improvement Act, 1850 (13 & 14 Vict. c. cix., an Act to alter and amend the Acts relating to the navigation of the river Lee in the counties of Hertford, Essex, and Middlesex; and to enable the trustees further to improve the navigation, and to dispose of the surplus water, and for other purposes), and the Acts therein recited, the management of the Lee, from the town of Hertford downwards (being so much thereof as is navigable), is intrusted to the body styled the Trustees of the River Lee; that it is expedient that the duties and powers of the trustees be transferred to the new body of conservators to be constituted, the trustees being formed into a constituency, and being represented in the new body by members thereof elected by them as in this Act provided; and that the new body should comprise representatives of the New River Company and the East London Waterworks Company (both which companies draw water for the metropolis from the Lee), and representatives of traders interested in the Lee, and of local and public authorities.

Sect. 3 describes the Lee and its tributaries; and sect. 4 sets limits to the conservancy of the Lee and the Thames; while sect. 5 incorporates the Lee Conservancy Board. Provisions are made for the preservation of the flow and purity of the river Lee (sect. 89), and for the prohibition of putting new sewage into it or its tributaries (sect. 91), and also for the discontinuance of existing sewerage works (sect. 92).

III. Canals.

33 *Geo. III. c. 80* (Grand Junction Canal).

"An Act for making and maintaining a navigable canal, from the Oxford Canal navigation at Braunston, in the county of Northampton, to join the river Thames at or near Brentford, in the county of Middlesex; and also certain collateral cuts from the said intended canal."

Recites the practicability and ex-

pediency of making the canal, and names the proprietors and empowers them to carry out the work, which is to be styled The Grand Junction Canal. The grounds to be taken for canal and collateral cuts, and for the towing-paths thereto, and the ditches and fences to separate such towing-paths from the adjoining lands not to exceed twenty yards in breadth, except in such places where any docks, basins, reservoirs, or pens of water shall be made, &c., &c. Line of canal to be guided by plans and books of reference, and no deviation of more than 100 yards from such plans and books of reference, &c. to be made without the consent of the landowners. Bodies politic empowered to sell and convey lands. Contracts and sales to be made at the expense of the company. Persons qualified, as required by the Act, appointed commissioners for settling and adjusting all questions and differences which may arise between the company of proprietors and the several persons interested in lands, tenements, mills, mines, waters, or premises which may be taken, used, affected, or prejudiced by the execution of the powers hereby granted. Powers of commissioners defined. They are to settle proportion of money to be paid to persons interested. Millers not unnecessarily to draw down the water of their mill streams, to the prejudice of their navigation. If the company deepen any stream, they shall make good the damage to occupiers of mills thereon. Company to divert the water from mill streams for rebuilding and repairing any mill. Provisions for the apportionment of shares and the levying of rates of tonnage, power being given to alter rates, and exemptions from payment thereof being made in certain cases. Company may lease rates. Places to be made for boats to turn or to lie in, or for other boats to pass; and penalties are laid on persons overloading and obstructing the navigation, opening the locks, destroying the works, or doing other damage to the navigation. Vessels obstructing the navigation are to be removed, and vessels sunk to be weighed up.

The Act is amended and extended by 34 *Geo. III. c. 24, sect. 19* of which provides that the company shall be rated to all parochial and parliamentary taxes in respect of lands already purchased or taken, or to be purchased or taken, as well as for warehouses and other buildings, in the same proportion as other lands and buildings lying near the same are or shall be rated, and as

each particular board depend,¹ and a fuller idea of their nature may perhaps be gained by a consideration of the Acts relating to the Thames, which may be presumed to offer the best example of a complete system of conservancy.

The Thames Conservancy Act, 1894 (57 & 58 Vict. c. 187), is a consolidating and amending Act for the preservation and improvement of the river for the purposes of navigation for profit and pleasure, and as a source of water supply.² It repeals practically the whole of the former Acts dealing with the river except the Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict. c. 133).³ Part I., sects. 1—4, consists of definitions. It defines "*the Thames*" to mean the rivers Thames and Isis from Cricklade, Wiltshire, to an imaginary line drawn from the entrance to Yantlett Creek, Kent, to the City Stone, opposite Canvey Island, Essex, and the river Kennett between the common landing-place at Reading, Berks, and the Thames and the river Lee and Bow Creek below the south boundary stones in the Lee Conservancy Act, 1868, mentioned. The word "shore" means the shores of the Thames so far as the tide flows and reflows between high and low water marks at ordinary tides.⁴ The "Port of London" is defined in this section and Schedule II.

Thames
Conservancy
Act, 1894.

Part II., sects. 5—57, deals with the qualifications and appointment, payment and meetings of the thirty-eight conservators.⁵

Part III., sects. 58—238, deals with the property, powers and

the same lands, &c. would be rateable, if the property of individuals.

43 *Geo. III. c. 102* (Caledonian Canal).

An Act for granting to his Majesty the sum of 20,000*l.*, towards defraying the expense of making an inland navigation from the Eastern to the Western sea by Inverness and Fort William, and for taking the necessary steps to execute the same.

Commissioners are appointed (sects. 2, 3), who may construct harbours, docks, basins, &c. tide locks, piers, jetties, &c. (sect. 6); may fix the line of navigation, and contract for the purchase of lands necessary (sects. 6, 7). Bodies politic empowered to contract for the sale and conveyance of lands (sect. 8). Commissioners may set out and make contracts for, and purchase lands, &c. necessary for harbours, &c. (sects. 10, 12), and may levy rates and duties

(sect. 23), and may lease the same.

[Additional powers were given to the commissioners by 44 *Geo. III. c. 62*, and other Acts. By 39 *Geo. III. c. xxvii.*, the Crinan Canal was authorized to be constructed; and by 11 & 12 *Vict. c. 54*, the commissioners of the Caledonian Canal are newly incorporated (sects. 1, 2), and both the Caledonian and Crinan Canals united and vested in them (sects. 4, 5).]

¹ As to the number of boards, see the Duke of Richmond's speech in the House of Lords, at the first reading of the Rivers Conservancy Bill, 7th March, 1879.

² Preamble.

³ Schedule I.

⁴ See *Thames Conservators v. Sneed*, *post*, p. 478, n. (1).

⁵ As to voting by proxy for election of a conservator by shipowners under sects. 22, 23, and 25, see *Reg. v. Samuel*, (1895) 1 Q. B. 815.

duties of the conservators. Sect. 58 preserves to the conservators all the estate, right, title and interest in the bed,¹ soil

¹ In *The Thames Conservators v. Smeed*, (1897) 2 Q. B. 334, over-ruling *Pearce v. Bunting*, (1896) 2 Q. B. 360, it has been held by the Court of Appeal that the word "bed" in the tidal portion of the river under sect. 58 means the soil between the ordinary high water mark on one side and the ordinary high water mark on the other side—in fact, includes what is ordinarily termed the foreshore; and that, therefore, no person other than the conservators and their agents can dredge or raise gravel, &c., there except with license of the conservators. A. L. Smith, L. J., says, in delivering judgment: "The view I take of the Act of 1894 is this: The conservators are a statutory body brought into existence for the purpose of preserving, improving, and maintaining the navigation of the river Thames, from Cricklade to Yantlett Creek (and they have some jurisdiction below that creek), but the powers granted to them by the Act of 1894 are all subservient thereto, and except for these purposes no powers are granted to them at all. I omit the powers given to them for keeping the waters of the Thames pure, for these have no bearing on the case." "What," he continues, "is the *primâ facie* meaning of the words 'the bed of the Thames?' In my judgment they denote that portion of the river which in the ordinary and regular course of nature is covered by the waters of the river. It need not be constantly covered if in the ordinary course of things it is habitually covered. I will cite a passage from the judgment in an American case, namely, that of the *State of Alabama v. State of Georgia* ((1859) 64 U. S. 515), which I cited in my judgment in *Hudson v. Ashby* ((1896) 2 Ch. 1, at p. 25), for it exactly conveys what I understand by the meaning of the phrase 'bed of a river.' It is this: 'The bed of the river is that portion of the soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.' This, when applied to a tidal river, means without reference to extraordinary tides at any time of the year. This, in my judgment, is the *primâ facie* meaning of the words

"bed of the Thames,' and the question is, in the Act of 1894, is there a context which causes the words not to bear their *primâ facie* and ordinary meaning? In the unreported case in 1891 of *Goolden v. Conservators of the Thames*, "a construction was placed by the House of Lords upon the words 'bed of the Thames' in sect. 6 of the Thames Conservancy Act of 1867, which Act, although repealed by the Act of 1894, has, as regards sects. 6 and 7 thereof, in substance been re-enacted in the Act of 1894 by sects. 83 and 87, with the addition of the saving clause in sect. 87 in favour of the owners of lands above Staines. This case throws a considerable light upon some of the points raised in the present action, though I notice that neither my brother Cave nor my brother Willis, in their judgments in the case of *Pearce v. Bunting* ((1896) 2 Q. B. 361), alluded to it. It is to review their decision in this last case that the present action is brought" (pp. 336—339). After quoting sect. 6 of the Act of 1867, empowering the conservators to dredge, dig, &c., and remove shoals, &c., in the bed of the Thames between Staines and Cricklade, and sect. 7, which prohibits persons other than the conservators from dredging, &c., without their license, upon which the House of Lords gave judgment, he points out that, though when passed they applied only to the Upper Thames, they were extended by sect. 29 of the Thames Navigation Act, 1870, to the river below the City Stone at Staines to Yantlett Creek, and, therefore, applied to it when *Goolden's case* was decided by the House of Lords in 1891. He continues: "Whatever 'the bed of the Thames' meant in sect. 6 of the Act of 1867, it meant the same in sect. 7 of that Act, which last section is almost identical with sect. 87 of the Act of 1894, excepting the proviso saving the rights of owners above Staines, which is expressly inserted in sect. 87 of the Act of 1894. The House of Lords, in *Goolden's case*, held that the words 'bed of the Thames' in sect. 6 of the Act of 1867 meant the soil underneath the waters of the river situated between bank and bank, and the dredging powers of the conservators conferred by this section extended not only to that part of the Thames above Staines which was navigable, but also to that part of the Thames which was not navigable, and which was the private

and shores which were vested in them immediately before the passing of the Act.¹ By sect. 62—64 powers are given to

"property of a riparian owner. That
"this section was held to take away and
"interfere with private rights is beyond
"dispute, and that although no compensation was given to the owner of the
"soil for this deprivation of his rights.
"The House of Lords also held that the
"dredging powers of the conservators
"were limited to improving the bed of
"the river, that is, to the exercise of the
"powers conferred upon them by the
"Acts, and that, if dredging were carried
"on by the conservators for purposes
"other than that of exercising the
"powers conferred upon them by the
"Act, such dredging would not be permissible. I think that what the House
"of Lords then held has pointed application to the true construction of sect.
"87 of the Act of 1894" (pp. 339, 340).
"I can find nothing in the Act which
"can be relied on as cutting down the
"ordinary and *prima facie* meaning of
"the words 'the bed of the Thames'
"in sect. 87. My judgment upon this
"peculiarly ill-drawn Act is, that the
"conservators by themselves, their
"agents and servants, have power to
"dredge and raise gravel, sand, and
"other substances from all parts of the
"river Thames within their jurisdiction
"between ordinary high water mark on
"one side of the river and ordinary high
"water mark upon the other, if they do
"so for the purpose of preserving, improving, and maintaining the navigation of the Thames, or for the other
"navigation purposes mentioned in the
"Act; and that they are also empowered
"to grant licences to other persons to
"dredge and raise gravel, sand and other
"substances for like purposes, but for no
"other; and that by sect. 87 there is an
"absolute prohibition imposed against
"any one dredging or raising gravel,
"sand, ballast, or other substances in
"the Thames between ordinary high
"water mark on the one side and ordinary high water mark on the other,
"without the license of the conservators,
"even although the soil between those
"limits is private property; and that for
"so doing without the license of the
"conservators the penalty mentioned in
"the section attaches. My judgment
"only applies to the Lower Thames"
(pp. 342, 343).

"In the case of *Pearce v. Bunting*
"((1896) 2 Q. B. 360), above mentioned,
"my brother Cave relied greatly, and my
"brother Wills also to some extent, upon

"the fact that, as no compensation was
"given by the statute, it was improbable
"that private rights would be interfered
"with by the legislature, and this ordinarily is so; but the case of *Goolden v. Thames Conservators* (unreported),
"in the House of Lords, indicates that
"these dredging powers are given to the
"conservators for navigation purposes,
"without compensation being also given
"to private owners for having their
"rights thus interfered with. I may point
"out that by sect. 72 of the Act of 1894
"public rights of navigation are given
"over private waters, and the sole saving
"clause therein in favour of landowners
"is that they may prevent the anchoring, mooring, loitering, or delay of any
"vessel thereon, and no compensation
"for this deprivation of their rights
"taken away by the section is given to
"the landowners. The question, as it
"seems to me, is not what soil has been
"vested in the conservators, which my
"brother Cave held to be the question,
"but what powers of dredging, and
"raising gravel, and other substances,
"and of granting licences to others to
"do so, have been granted by the statute
"to the conservators whereby to preserve,
"improve, and maintain the navigation
"of the Thames. If a private owner
"were to be allowed to dredge and raise
"gravel from the bed of the Thames in
"the tideway at his own will and pleasure, it is manifest that this might so
"interfere with the flow of the river as
"in some cases to seriously impede its
"navigation; and, in my opinion, to
"prevent and guard against this, it is
"that this plenary and exclusive power
"of dredging, and raising gravel and
"other substances, is given to the conservators over that part of the bed
"of the Thames where Hadleigh Ray
"is situated" (pp. 343, 344).

¹ By the Thames Conservancy Act, 20 & 21 Vict. c. cxlvii. (amended by 27 & 28 Vict. c. 113), the right of the soil of the bed of the river up to high water mark, which had been the subject of dispute between the Crown and the corporation of the city of London, is vested in the latter body. In the case of *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, Lord Chancellor Cairns says: "The conservators of the Thames, as your Lordships well know, have, under the Act of 1857, carried over to them all the rights in the bed and soil of the river Thames

improve and complete the navigation of the Thames for profit or pleasure, and to maintain and alter towpaths, bridges, ferries, locks, weirs, &c., and to enter on lands in or near the river for the purpose, but no new ferry is to be established above Teddington Lock, within a mile of any legal ferry or bridge. Sect. 65 gives power to lease heads of water for water power. By sect. 67, subject to bye-laws the public may use, with vehicles, roads except towing-paths, and with vessels, locks and towing-paths for towing. By sect. 69, water bailiffs, to be appointed for execution of fishery bye-laws, may search fishing-boats.¹ Sect. 71 imposes penalties for injuring property of the conservators. Sects. 72—82 regulate navigation which is free to the public, including all such backwaters, creeks, side-channels, bays and inlets, connected therewith as form part of the river, subject to a power to the conservators to exclude the public for a limited period from any specified part of the river. The right of navigation is to include a right to anchor, moor or remain stationary for a reasonable time, subject to the legal rights of riparian owners to prevent such anchoring,² &c. By sects. 75, 76 powers are given to regulate the height of the water of the river. Sects. 77—82 give powers to remove sunken vessels and obstructions, and to sell vessels and goods to reimburse for expenses and to compel owners and occupiers to repair wharves, piers, and artificial banks; sects. 83—89 give powers of dredging,³

"which belonged to the Crown, or which were claimed by the corporation of London. They are made the guarantians, as it were, of the navigation of the Thames, and the protectors of the bed and soil of the Thames for the purposes of navigation. They have certain powers—very large powers for making bye-laws to protect the navigation; they have power to make piers and landing-places for the accommodation of the public; and they have powers to authorize riparian owners to make landing-places, and wharves and jetties, and to put down mooring-chains and moorings, for the better and more convenient enjoyment of and access to their lands." They are owners of the soil and foreshore of the river for certain specified purposes only, and are not owners for the purposes of sect. 4 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), and so liable to abate a nuisance not caused by their fault. *London Port Sanitary Authority v. Thames Conservators*, (1894)

1 Q. B. 647.

This statement of the law of course only applies to the river Thames, so far as the tide reaches, *i.e.* to Teddington Lock; above this point the soil and bed of the river belongs *prima facie* to the riparian owners *ad medium filum aquæ*, as in other rivers. The conservators have, however, by Act of Parliament, purchased and otherwise acquired large rights as to locks, towing-paths, &c.

¹ As to appointment of water bailiffs under the former Acts, see *Turnaday v. Shaw*, 3 El. & El. 588; 30 L. J., M. C. 113; 3 L. T. 147.

² As to this, see remarks of A. L. Smith, L. J., in *Thames Conservators v. Smeed*, *ante*, p. 478, n. (1).

³ The dredging powers of the conservators are limited to improving the bed of the river, that is, to the exercise of the powers conferred on them by the Acts, and if dredging were carried on by the conservators for purposes other than that of exercising the powers conferred upon them by the Acts, such dredging

deepening and altering the bed and channel. Sects. 90—108 deal with pollution. By sect. 91 it is the duty of the conservators to preserve and maintain the flow and purity of the river and its tributaries. By sects. 92 and 93 penalties may be imposed for throwing ballast, &c., or draining sewage or offensive matter into the river.¹ By sect. 101 boats above Teddington Lock may be searched for the purpose of ascertaining if sewage or offensive matter can pass from them into the river. By sects. 109 to 118 licences² may be granted to owners or occupiers of land adjoining the river for docks, piers, embankments, cranes, &c.,³ below Teddington Lock. By sect. 117 embankments made under licence are to vest in the owner of adjoining

would not be permissible: *Goolden v. Conservators of the Thames*, (1891, unreported), cited and followed in *Thames Conservators v. Smeed*, (1897) 2 Q. B. 334. In *Blantyre (Lord) v. Clyde Navigation Trustees*, 6 App. Cas. 273, H. L. (Sc.), it was held that the Clyde Navigation Trustees, being empowered by sects. 76 and 84 of 20 & 21 Vict. c. 194, to dredge the bed of the river Clyde to a depth of seventeen feet, cannot be interdicted from dredging ground which has been declared the property of the riparian owner, subject to any right which the public may have over it, and subject also to any rights conferred on the trustees by their Acts of Parliament; but so held without prejudice to the question of their liability to subsequent compensation for damage.

In the case of *Palmer v. Conservators of the Thames and Edwards*, (1901) Ch. W. N. 228; 18 T. L. R. 88, it has been held by Kekewich, J., that a licensee under the conservators is not entitled under sects. 83 and 84 to dredge and sell the proceeds of the dredging for profit in a part of the river where the soil of the bed and the right of fishery were the property of a private owner. His Lordship, in giving judgment, said he had to decide a very dry question of law. The conservators were entitled by law "to dredge, cleanse, and scour the river for the purpose of maintaining, freeing from obstruction, and improving the navigation of the river." They were further authorized to sell the proceeds of the dredging, and carry the money over to the credit of the conservancy account. Could they give authority to another person to do this work, and also to sell the proceeds of the dredging and keep the money? The soil of the river was the property of the

riparian owners, and not of the conservators. It was as much the property of the riparian owners as the meadows on the banks on either side. The conservators were the mere creatures of the statute. It has been admitted that they were maintaining the river, and it had been proved that they had acted honestly. They believed that the method they had adopted was the most convenient way of exercising their powers, and was to the advantage of the public. But if what they had done was not provided for by the Act, then the plaintiff had a right to succeed. In his lordship's opinion, the defendants had exceeded their powers, though honestly. That being so, the plaintiff was entitled to judgment.

¹ As to the meaning of "wilfully suffering" in sect. 92, sub-sect. 4, see *High Wycombe Corporation v. Thames Conservators*, 78 L. T. 463 (1898), *ante*, p. 181, n. 3. As to the drainage of the metropolis, see 18 & 19 Vict. c. 120; 21 & 22 Vict. c. 104, and see also the Rivers Pollution Act (39 & 40 Vict. c. 75), *ante*, Chap. III. pp. 182 *et seq.* As to the Thames Embankments, see 25 & 26 Vict. c. 93; 26 & 27 Vict. cc. 45 and 75; 30 & 31 Vict. c. 40; 32 & 33 Vict. c. 102; 33 & 34 Vict. c. 24; and 36 & 37 Vict. c. 40.

² As to rights of licensees of piers under the Thames Embankment Act, 1862 (25 & 26 Vict. c. 93), and the Thames Conservancy Act, 1857 (20 & 21 Vict. c. 147), and Thames Embankment Act, 1868 (31 & 32 Vict. c. 40), see *Thames Conservators v. S. E. Rly.*, 24 L. T. 246; *Temple Pier Co. v. Metropolitan Board of Works*, 34 L. J., Ch. 262; 12 L. T. 369.

³ As to erections interfering with the right of "access" to riparian lands

land. Sects. 119 to 125 regulate the erection and maintenance of piers, sects. 126—134 the appointment and powers of harbour-masters, sects. 135—137 beacons and lights. Sects. 138—154 regulate pleasure-boats, which by sect. 154 are to be navigated with care and caution and so as not to endanger life or cause injury. Sects. 155—176 regulate duties of tonnage in the Port of London, lock and tonnage tolls westward of London Bridge, and pier tolls.¹ Sects. 177—181 give powers to the conservators for the purchase and sale of lands and easements. By sect. 182 no works on the bed or shore below Teddington Lock are to be erected without the approval of the Board of Trade.² By sect. 185 no firearms may be used on the river or banks above a line from Barking Creek to Margaretness. Sects. 190—195 give power to make bye-laws for regulating elections, navigation,³ drawing down of water, collection of duties and tolls, preventing pollution, regulating bathing and prevention of nuisances, &c., protection of fisheries⁴ and imposing of penalties. Sects. 196—211 contain legal and police regulations,

under 20 & 21 Vict. c. 147 (repealed), see *Lyon v. Fishmongers' Co.*, L. R., 1 App. Cas. 662; *Kearns v. Cordwainers' Co.*, 28 L. J., N. S. 285.

¹ By sect. 165 the conservators are authorized to levy a toll of sixpence "for each and every time of call" on any vessel using any of their piers or landing-stages to embark or discharge her passengers and goods. The plaintiffs owned a pleasure steamer which ran day trips between the Old Swan Pier, London Bridge, and Hampton Court. The steamer was brought alongside the Old Swan Pier about three-quarters of an hour before the advertised starting time and remained there until she started, her officers meanwhile doing all they could to get persons to take tickets for the trip. The conservators by resolution decided that the plaintiffs used the pier for a longer period daily than would be covered by a mere "call" at the pier by their vessel, for which the 6d. toll was payable, and they alleged their right to impose a terminal charge for this use of the pier by the plaintiffs of 2l. a week. For a time this increased charge was paid. *Held*, that, although the conservators might have a right to ask for special payment from a vessel using the pier other than for the purpose merely of embarking passengers or goods, that would be based on contract; that there was nothing in the Act which gave the defendants the right to levy more

than the 6d. toll on a vessel merely because she was more than a few minutes alongside a pier embarking or discharging her passengers or goods; and that the extra charge already paid, being unauthorized, was paid without consideration and could be recovered back: *Queen of the River Steamship Co. v. Thames Conservators*, 47 W. R. 685 (1899).

² Under a similar section (100) of the Thames Conservancy Act, 20 & 21 Vict. c. 147, repealed by sects. 27 and 28 of 21 & 22 Vict. c. 104 (The Metropolitan Main Drainage Act), it has been held that the Metropolitan Board of Works had no power under sect. 135 of the Metropolitan Management Act (18 & 19 Vict. c. 120) to erect any works on the bed or soil of the Thames without the approval of the Admiralty, and that therefore they were liable for damage done to a vessel which grounded on a pile negligently placed on the foreshore by their constructor: *Brownlow v. Metropolitan Board of Works*, 16 C. B., N. S. 546.

The powers of the Metropolitan Board of Works under the Metropolitan Management Act and certain special Acts were transferred to the London County Council by the Local Government Act, 1888 (51 & 52 Vict. c. 41).

³ For these bye-laws see *post*, Appendix I.

⁴ For these bye-laws see *post*, Appendix II.

and sects. 212—238 contain saving clauses as to the rights of the Crown, His Majesty's ships, the Trinity House and other public bodies, persons and owners and occupiers of private fisheries, and a general clause, 238: "Except as in this Act " provided nothing in this Act shall take away, alter or abridge " any right, claim, privilege, franchise, exemption, or immunity to " which any owner or occupier of any lands on the banks of the " Thames, including the banks thereof, or of any eyots or islands " in the Thames, or any person is now by law entitled, nor take " away or abridge any legal right of ferry, but the same shall " remain and continue in full force and effect as if this Act had " not been passed."

Part IV., sects. 289—291, deals with financial matters.¹ Part V., sects. 291—298, empowers the metropolitan water Companies to require the conservators to alter or not to do works which in their opinion will injuriously affect the flow or purity of the water above their intakes, and deals with the amount of water to be taken by them under their Acts of Parliament. Part VI., sects. 299—313, contains amendments to the Watermen and Lightermen's Act, 1859, noticed hereafter.

Various Acts, all now repealed by 57 & 58 *Vict. c. 187*, have been passed for the regulation of the navigation on the Upper Thames above the flow of the tide, where there has been an immemorial right of navigation. These Acts regulated the rights and duties of owners of towing-paths and locks; and provided compensation in many cases for interference with their rights, and afforded protection to the public from their exactions.

The Upper
Thames.

Thus, by 21 *Jac. I. c. 33*, the Thames was to be made navigable between the village of Bercott and Oxford, and the commissioners empowered for the purpose directed to agree with the adjoining landowners for compensation before interfering with their lands.

By 24 *Geo. II. c. 8*, which recites that the rivers of Thames and Isis have been navigable time out of mind from the city of London to the village of Bercott in Oxfordshire, and from the city of Oxford northwards beyond Lechlade in Gloucestershire,

¹ As to liability of Corporation of London for money borrowed by them as conservators after 20 & 21 *Vict. c. 147*

(repealed), see *Brown v. Mayor of London*, 7 *Jur.*, N. S. 729; affirmed 13 *C. B.*, N. S. 828.

and that by the Act of 21 *Jac. I.*, the said rivers were made navigable from Bercott to Oxford, the conservancy of the Thames from Staines to Cricklade is vested in navigation commissioners for the prevention of abuses and exactions.

By 11 *Geo. III. c. 45*, sect. 7, powers were given to the commissioners to purchase lands, &c., for making necessary works and towing-paths, and to make further regulations as to traffic.

By sect. 9, they could oblige proprietors to keep up locks, weirs, &c., and to keep the water at a proper height; and they were bound by sect. 11 to keep a proper head of water for working mills.

By sect. 12, compensation was given to owners of locks for diversion of traffic caused by alterations.

By 29 & 30 *Vict. c. 89*,¹ the whole of the navigable part of the river Thames, from Cricklade to Yantlet Creek, was placed under one management, and the works, powers, &c. of the Upper Thames Commissioners were transferred, by sects. 24 and 25, to the conservators of the river Thames under 20 & 21 *Vict. c. 113*, five additional conservators being appointed.

By sect. 41, the conservators were to have the same powers in the Thames from Staines to Cricklade as they have below Staines, and the Conservancy Acts were to extend *mutatis mutandis* to the upper river.

By sect. 43, the property in all locks, dams and weirs, was vested in the conservators, who were to repair them instead of the mill owners, liberty being given to them, however, to disclaim any dam, &c.

By sect. 44, compensation was to be given for such weirs, &c.

By sect. 45, provision was made as to disused portions of the navigation.²

Watermen's
Acts.

The rules governing the large class of persons entitled to manage the navigation of barges and boats on the Thames are framed by the "Company of Watermen and Lightermen," incorporated by sect. 4 of 7 & 8 *Geo. IV. c. lxxv.*, which recites the various Acts relating to watermen, bargemen, wherry-men,

¹ The Acts recited in the schedule to this Act are 24 *Geo. II. c. 8*; 11 *Geo. III. c. 45*; 15 *Geo. III. c. 11*; 28 *Geo. III. c. 51*; 35 *Geo. III. c. 106*; 52 *Geo. III. c. 47*.

² As to compensation for diverting

traffic under statutes 11 *Geo. III. c. 47*; 15 *Geo. III. c. 11*; 28 *Geo. III. c. 51*; and 35 *Geo. III. c. 106*, see *Rex v. Commissioners of Thames and Isis*, 5 *Ad. & E.* 804; 44 *R. R.* 591; 8 *Ad. & E.* 901.

and lightermen, &c., and enacts that they shall henceforth be one body corporate by the name and style of the "Masters, Wardens, and Commonalty of Watermen and Lightermen of the River Thames."

The above statute was repealed by sect. 6 of "*The Watermen's and Lightermen's Amendment Act, 1859*" (22 & 23 Vict. c. cxxxiii.), but by sect. 7¹ it is provided that such repeal shall not affect—

1. The existence of the company or its property whether real or personal, or any of its rights and obligations as a body corporate, except as altered by this Act.

2. Any penalty, forfeiture, or other punishment incurred or to be incurred in respect of any offence committed before this Act comes into operation.

3. Any appointment or licence duly made or granted under enactment hereby repealed.

The Act of 1859 is amended in some particulars by Part VI. (sects. 299—318) of the *Thames Conservancy Act, 1894*.

By sect. 3 of the Act of 1859, and sect. 299 of the Act of 1894, the term "*lighterman*" shall mean any person working or navigating for hire a lighter, barge, boat, or like craft within the limits of this Act, and the term "*the company*" shall mean the master, wardens, and commonalty of watermen and lightermen of the river Thames. The Act is stated by sect. 10 to extend to all parts of the river Thames from and opposite to and including Teddington Lock in the counties of Middlesex and Surrey, to and opposite to and including Lower Hope Point near Gravesend, in the county of Kent, and all docks, canals, creeks, and harbours of or out of the said river as far as the tide flows therein.

By sect. 3, "*waterman*" is defined to mean any person navigating, rowing, or working for hire a "passenger boat," unless there is something in the context inconsistent with such meaning; and, by sect. 2, "*passenger boat*" is defined as "used throughout this Act" to be any sailing-boat, river steam-boat, row-boat, wherry, or other like craft used for carrying passengers within the limits of this Act, unless there is something in the context inconsistent with such meaning.

¹ In *Doick v. Phelps* (9 W. R. 70), it was held that this section does not preserve the exemption in favour of western barges contained in sect. 101 of 7 & 8

Geo. IV. c. 75. See also *Tibble v. Beadon*, 24 L. J., M. C. 104; and S. C. *nom. Reg. v. Tibble*, 4 E. & B. 888.

Sects. 9 to 28 regulate the constitution and election of the company.

Sects. 29 to 41 regulate the plying of watermen on Sundays.

By sects. 43, 44, all owners of barges and lighters are to be registered.

By sects. 46 to 53, amended by sects. 301—308 of the Act of 1894, freemen of the company may employ apprentices and assistants on certain conditions.

By sect. 54, amended by sect. 311 of the Act of 1894, any person¹ not being a freeman licensed according to the Act, or a duly qualified apprentice to a freeman, who shall navigate any wherry, passenger boat, lighter, vessel, or other craft² upon the river within the limits³ of the Act for hire or gain is made liable to a fine of 40s.⁴

Sects. 56 and 57, amended by sects. 303—305 of the Act of 1894, regulate the qualifications of watermen and lightermen's licences.

By sect. 66, amended by sect. 311 of the Act of 1894, no barge, lighter, or boat for goods or merchandise may be navigated

¹ This section, and sects. 68 and 70, have been held not to apply to the case of a person conveying for his own purposes his servants and workpeople, and not making any charge therefor; the whole sections being overridden by the words "for hire or gain:" *Todhunter v. Buckley*, 7 L. T., N. S. 273.

² Sect. 57 of 7 & 8 Geo. IV. c. 75, empowered the making of bye-laws for regulating "the boats, vessels, and other craft to be rowed or worked within the limits of the Act:"—Held, this section applied to a steamboat of 187 tons, navigating at a speed forbidden by the bye-laws: *Tisdell v. Umbe*, 7 A. & E. 788; see *Blandford v. Morrison*, 15 Q. B. 724.

Sect. 37 of 7 & 8 Geo. IV. c. 75 (Watermen's Act), imposes a penalty on any person who, not being a freeman of the Watermen's Company, or an apprentice to a freeman, or to the widow of a freeman, shall act as a waterman or lighterman, or ply, or work, or navigate, or cause to be worked or navigated, any wherry, lighter, or other craft upon the Thames from or to any place or ship within the limits of the Act for hire or gain:—Held, that a steam tug of 87 tons, employed in moving another vessel, was not "a wherry, lighter, or other craft" under this section, and that a person navigating her, not being a freeman, did not incur a penalty: *Reed v. Ingham*, 3 E. & B. 889.

³ Under a similar section of 7 & 8 Geo. IV. c. 75, it has been held that the navigation of a barge falls within the Act, although the voyage commence without the limits; and that an unauthorized person is liable to the penalty, although he is paid, not for the particular job, but by the week: *Reg. v. Dibble*, 4 E. & B. 888.

⁴ The Isle of Dogs Ferry Society were owners of an ancient ferry, called Potter's Ferry, which was described in their title deeds as between the Isle of Dogs and Greenwich. Down to 1850 the use of the ferry appeared to have been exercised between an ancient landing-place in the Isle of Dogs and Garden Stairs opposite, and occasionally one or two other landing-places at Greenwich. Since 1850, a dock and wharf and public roads were constructed by C., in the Isle of Dogs, about 800 yards lower down the river than the ancient landing-place. The society leased their right of ferry to D., who employed M., a freeman, to carry passengers for hire from C.'s dock and wharf to a point opposite at Greenwich, and not having a licence, as required by 7 & 8 Geo. IV. c. lxxv. s. 38, he was convicted in a penalty under its provisions:—*Held*, first, that sect. 79 was not limited by sect. 101, and extended to except boats plying in the exercise of a right of ferry from the operation of the Act: but secondly, that the right did not

within the limits of the Act, unless there be in charge of such craft a lighterman duly licensed, or an apprentice duly qualified, under penalty of 5*l*.¹

By sect. 67, amended by sect. 305 of the Act of 1894, any unlicensed person who rows, steers, or navigates for hire, within the limits of the Act, any passenger boat, is liable to a penalty of 5*l*. for each offence.

By sects. 68—70, no passenger boat may carry more passengers than it is licensed to carry under penalty of 40*s*. for each extra passenger.

Sects. 71—79 regulate the prices which may be charged for passenger boats. By sect. 75, the company are to keep a register of licensed watermen and lightermen.

By sect. 80, bye-laws may be made for the purposes of the Act, provided they be not inconsistent with any of the laws of the kingdom, or with the bye-laws of the conservators of the river Thames.² No bye-laws to be valid until approved by the conservators of the Thames.

The remaining sections regulate proceedings for penalties, and provide exceptions in favour of the rights of the Trinity House,

extend to the landing-place at C.'s dock and wharf, and therefore that sect. 99 did not apply, and M. was properly convicted: *Reg. v. Matheux*, 5 El. & Bl. 546; 25 L. J., M. C. 7.

¹ Six barges, fastened together in pairs, were towed by a steam-tug on the river. Four lightermen were in charge, but no one was on board either of the last two barges:—Held, that the two barges were navigated in contravention of the Act: *Elmore v. Hunter*, 3 C. P. D. 116. Where a barge owner employed a freeman and an apprentice of a freeman to navigate a barge from the Pool to Lambeth and back, and owing to their misconduct the barge injured another barge:—Held, that the owner was liable, and that he was not protected by the Watermen's Act restraining him in the selection of his servants: *Martin v. Temperley*, 4 Q. B. 298; 12 L. J., Q. B. 129.

² Under a similar section of 7 & 8 Geo. IV. c. 75, a bye-law was made imposing a penalty on any freeman who should set to work, to row or navigate, any non-freeman. A freeman who had employed a non-freeman to assist in navigating his barge was convicted under the bye-law:—Held, the bye-law was good, as it only applied to employ-

ment of persons for ordinary rowing, &c., and was not inconsistent with the Act: *Edmonds v. Watermen's Co.*, 1 Jur., N. S. 727.

A bye-law made under sects. 57 and 106 of the Watermen's Act (7 & 8 Geo. IV. c. lxxv.), was made applicable to "every freeman of the company using "and working for hire any wherry, boat, " &c., for carrying passengers within the "limits of the Act:—Held, that this did not apply to a freeman working a boat on a private ferry as a servant of the lessee of the ferry. *Quære*, whether under the Act bye-laws may be made affecting private ferries: *Reg. v. Giles*, 5 W. R. 575.

Under the Thames Conservancy and Watermen's Acts, and bye-laws thereunder, if a barge under way exceeds 50 tons, there must be two qualified licensed watermen on board, and one is not sufficient, though assisted by another unqualified man: *Perkins v. Gingell*, 50 J. P. 277.

The watermen and apprentices, being freemen of the Watermen's Company, and plying at any stairs, and having formed themselves into a turnway club, under the bye-laws of the company, have no power to make regulations, except such as are consistent with the Act and

Mayor and Corporation of London, and owners of ferries, and others.¹

General enactments as to inland navigation. Prohibition of casting rubbish, &c., into navigable rivers, &c.

We will conclude this chapter by noticing a few general enactments relating to inland navigation.

By 54 *Geo. III. c. 159, s. 11*, if the owner or master of any ship or other person working any quarry, mine, or pit, "or any other person or persons whatsoever, shall cast, throw, empty, or "unload," either from such ship or from the shore, "any ballast, "stone, slate, gravel, earth, rubbish, wreck, or filth" into any port, harbour, or navigable river, "so as to tend to the injury "or obstruction of the navigation thereof, or in any place "or situation on shore where the same shall be liable to be "washed into the sea," or into any port, harbour, or navigable river, either by tides, storms or floods, he shall be liable to a penalty.²

bye-laws, and therefore they have no power to refuse to accept as a member one who, having complied with the Act and bye-laws, and having tendered the requisite sum to the steward of the club, refuses to belong to an old-established burial club to which the watermen and apprentices plying at such stairs belong : *Reg. v. Atkins*, 4 W. R. 83.

¹ The following are the important sections in the Act of 1894 as to watermen :—

By sects. 301—305 it shall be lawful for any male person above the age of twenty, who has not previously been bound an apprentice under the Watermen's Company's Act, to contract in writing with any person authorized to take apprentices under the Watermen's Company's Act, to serve such person in assisting to navigate a lighter, or in assisting to work or navigate a steamboat upon the river Thames.

By sect. 311 nothing in sect. 54 or sect. 66 of the Watermen's Company's Act is to apply to any craft passing entirely through the limits of that Act, or to any barges navigating the Grand Junction Canal, passing into or out of the said canal from or to the river Thames, and not navigated up or down the said rivers.

By sect. 306, sect. 87 of the Watermen's Company's Act shall be read and construed as if after the words "apprentice of," in the beginning of the section, were inserted the words "a freeman or "of," so as to make the provisions therein contained applicable to the ap-

prentice of a freeman ; and by sect. 307, widows of freemen on taking apprentices are to employ freemen of the company or licensed watermen to instruct them.

Sect. 312. Notwithstanding anything contained in the Watermen's Company's Act, all barges duly registered from any places on the river Thames above Teddington Lock may be navigated on the river as far as London Bridge without being compelled to employ a freeman, apprentice, or other person licensed by the Watermen's Company in manner required by the Watermen's Company's Act or this Act ; and by sect. 313 the rights of owners of barges or other craft passing along the river Lee and its branches into or from or along the Thames are preserved.

² In the case of *United Alkali Co. v. Simpson*, (1894) 2 Q. B. 116 ; 63 L. J., M. C. 141 ; 71 L. T. 258, the appellants, in the course of their business as alkali manufacturers, discharged a large quantity of water containing solid matter in suspension through a drain into a tidal brook, which flowed into a navigable river. This solid matter was carried down by the tide and deposited in the river, but it was not alleged or shown that it tended to the injury or obstruction of the navigation of the river. It was held that the appellants were rightly convicted under the latter part of the section, though the section can only apply to deposits of rubbish of such a kind and quantity and in such a place that if they were washed into

"*The Malicious Injuries to Property Act*" (24 & 25 Vict. c. 97), sect. 30, provides that—Persons unlawfully and maliciously breaking down or cutting down, or otherwise destroying any sea bank, or sea walls, or the bank, dam or wall of or belonging to any river, canal, drain, reservoir, pool or marsh, whereby any land or building shall be, or shall be in danger of being, overflowed or damaged, or shall unlawfully or maliciously throw, break, or cut down, level, undermine or otherwise destroy any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse or other work belonging to any port, harbour, dock or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

24 & 25 Vict.
c. 97, ss. 30
and 31.

Injuries to
banks, walls,
&c. prohibited.

And by sect. 31, it is enacted that—Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground and used for securing any sea bank, or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbour, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal with intent, and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and, being convicted thereof, shall be liable at the discretion of the Court to be kept in penal servitude for a term not exceeding seven years, and not less than three years; or to be imprisoned for any term not exceeding two years with or without hard labour, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping.

"*The Railways Clauses Act, 1863*" (26 & 27 Vict. c. 92),¹

Railways
Clauses Act.

the sea or a navigable river they would tend to injure or obstruct the navigation.

Under a somewhat similar section in 14 Geo. III. c. 96, one of several Acts passed to improve the navigation of the Rivers Aire and Calder, the words "watercourses thereunto belonging"

were held not to include "tributary streams" unless they formed part of the navigation: *Smith v. Burnham*, 34 L. T. 774.

¹ "An Act for consolidating in one certain provisions frequently inserted in Acts relating to railways."

contains in Part I. the following provisions for the protection of navigation :—

By sect. 13, where the company is authorized by the special Act to construct, alter, or extend any work on, in, over, through, or across tidal lands, or a tidal water, the company shall on or near the work, during the whole time of constructing, altering or extending thereof, exhibit and keep burning at their own expense every night, from sunset to sunrise, such lights, if any, as the Board of Trade from time to time requires or approves ; and (notwithstanding the enactments for the time being in force respecting lighthouses) shall also, on or near the work when completed, always maintain, exhibit, and keep burning at their own expense every night, from sunset to sunrise, such lights (if any) for the guidance of ships as the Board of Trade from time to time requires or approves.

If the company fails to comply in any respect with the provisions of the present section, they shall, for each night in which they so fail, be liable to a penalty not exceeding twenty pounds.

Sect. 14.
The construction of bridges.

By sect. 14, where the company is authorized or required by the special Act to construct a bridge over a navigable tidal water, and the special Act does not make express provision respecting the span or spans thereof, then the company shall construct the same with a span or spans of such headway and waterway, and with such opening span or spans (if any), and according to such plans as the Board of Trade directs or approves.¹

Sect. 15.
Barges, vessels, or boats must not be detained at bridges.

By sect. 15, where the company constructs a bridge with an opening span, it shall not be lawful for the company to detain any vessel, barge, or boat at the bridge for a longer time than may be necessary for admitting a carriage or engine traversing the railway and approaching the bridge to cross the bridge, and for opening the bridge to admit the vessel, boat, or barge to pass ; and the company shall be subject to, and shall abide by, such regulations with regard to the user of the bridge, as may from time to time be made by the Board of Trade.

If the company detains a vessel, barge, or boat longer than the time aforesaid, or fails in any respect to abide by any such regulation as aforesaid, they shall for every such offence be liable

¹ As to temporary bridges, see *Priestly v. Manchester and Leeds Rly. Co.*, 4 Y. & Coll. 62 ; 2 Railway Cas. 134.

to a penalty not exceeding twenty pounds, without prejudice to any remedy against them for any loss or damage sustained by any person.¹

By sect. 16, where the railway cuts off access between the land and a tidal water or tidal lands, then, and in every such case, the company shall, during the construction of the railway, and from time to time thereafter, make and shall permanently maintain and allow to be used by all persons and at all times, free of toll or other charge, all such footways and carriage ways over, under or across the railway, or on a level therewith, as the Board of Trade from time to time directs or approves : provided always as follows :—

Sect. 16.
Access to
tidal lands
and tidal
waters.

(1) The company shall not be obliged to make a footway or carriage way over lands for the use of an owner or occupier who has agreed to receive, and has been paid compensation for the severance thereof from the tidal waters or tidal lands.

(2) The company shall not be obliged to make, or to allow to be made, a footway or carriage way in such manner as would interfere with the working or using of the railway.

(3) The expense of the making and maintenance of a footway or carriage way required to be made after the construction of the railway, shall be defrayed by the persons or body interested in the tidal water or tidal lands, for whose benefit or convenience the same is required.

Where the footway or carriage way is made across the railway on the level, then the manner of making and watching the level crossing shall be subject to the approval of the Board of Trade ; and where the level crossing is made after the construction of the railway, then all expenses attending the watching thereof shall be defrayed by the persons or body interested in the tidal water or tidal lands, for whose benefit or convenience the same is required.

By sect. 17, where the company is authorized by the special Act to construct a railway skirting a public navigable tidal river or channel, the company shall not make any deviation of the railway from the continuous centre line thereof, marked on the plan deposited by them at the Board of Trade, even within the limits of deviation shown on that plan, in such manner as to diminish the navigable space, without the previous consent of

Sect. 17.
Railways
skirting navi-
gable tidal
rivers, &c.

¹ See as to liabilities of companies *A.-G. v. Furness Railway*, 38 L. T., N. S. 555 ; see *post*, Chap. VIII.

the Board of Trade or otherwise than in such manner as is expressly authorized by the Board of Trade.

If any deviation is made in contravention of the present section, the Board of Trade may abate and remove the work in the construction whereof the deviation is made or any part thereof, and restore the site thereof to its former condition at the expense of the company; and the amount of such expense shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered with costs, as a penalty is recoverable from the company.

Sect. 18.
Abandonment of works on, in, across, &c. tidal lands or tidal waters.

By sect. 18, if a work constructed by the company on, in, over, through, or across tidal lands or a tidal water, is abandoned or suffered to fall into decay, the Board of Trade may abate and remove the work, or any part of it, and restore the site thereof to its former condition, at the expense of the company; and the amount of such expense shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered with costs, as a penalty is recoverable from the company.

Sect. 19.
Surveys of works over tidal waters or tidal lands may be ordered by the Board of Trade.

By sect. 19, if at any time the Board of Trade deems it expedient for the purposes of the special Act, or of this part of this Act, to order a survey and examination of a work constructed by the company on, in, over, through, or across tidal lands or tidal waters, or of the intended site of any such work, the company shall defray the expense of the survey and examination, and the amount thereof shall be a debt due from the company to the Crown, and be recoverable accordingly with costs, or the same may be recovered with costs, as a penalty is recoverable from the company.

Sect. 3.
Definitions.

"*Tidal river*" is defined by sect. 3 to mean any part of a river within the flow and ebb of the tide at ordinary spring tides; "*tidal water*" to mean any part of the sea or any part of a river within the flow and ebb of the tide at ordinary spring tides; and "*tidal lands*" to mean such parts of the bed, shore or banks of a tidal water as are covered and uncovered by the flow and ebb of the tide at ordinary spring tides.

Police regulations.

By 5 *Geo. IV. c. 83, s. 4*, a suspected person or reputed thief, frequenting any river, canal, or navigable stream, dock or basin, or any quay, wharf or warehouse, near or adjoining thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony,

shall be deemed a rogue and vagabond, and may be convicted.¹ By 7 *Geo. IV. c. 64, s. 13*, offences on a vessel passing along a canal can be tried in any county along or through which the vessel passes during its voyage, and where the bank or any part of a canal is the common boundary of two or more counties, an offence therein may be tried in any of the counties.²

By 3 & 4 *Vict. c. 50*,³ provision is made for keeping the peace on canals and navigable rivers. The preamble of the Act takes note of the outrages committed on canals and navigable rivers through England and Wales; and sect. 1 provides for the appointment of constables on the application of the committee of the Board of Trade, who are to be paid out of the monies of the proprietors (sect. 3). By sect. 13, it is provided, that nothing in local Acts containing penalties shall be thereby repealed.

8 & 9 *Vict. c. 28* authorizes canal companies, and the commissioners of navigable rivers, to vary their tolls or rates on different portions of their canals, and to reduce or advance them (sect. 1), charging the tolls equally on all persons under the like circumstances (sect. 2). The Act is not to apply, however, to existing companies until a meeting of the shareholders have determined thereupon, nor in other cases till approved by trustees or proprietors, and notices thereof published.⁴

The regulation of traffic on navigable rivers and canals is governed by a series of important statutes.

By 8 & 9 *Vict. c. 42*,⁵ canal companies are empowered to carry goods on their canals, or canals communicating therewith (sect. 1),

Tolls.

Regulation of traffic on navigable rivers and canals.

¹ This has been held not to apply to all streets and highways, but only to streets and highways leading or adjacent to places of the character mentioned in the Act: *Ex parte Tinam*, 39 L. J., M. C. 129. The Act was extended to Scotland and Ireland by 34 & 35 *Vict. c. 112, s. 15*.

² Cf. 7 *Will. IV. & 1 Vict. c. 36, s. 37* (Post Offices Offences Act), and the Fugitive Offenders Act, 1881 (44 & 45 *Vict. c. 69*), s. 21.

³ "An Act to provide for keeping peace on canals and navigable rivers" (1840). Sect. 1 of 1 *Vict. c. 80*, provides that whenever the appointment of special constables under 1 & 2 *Will. IV. c. 41*, or 5 & 6 *Will. IV. c. 43*, has been occasioned by the behaviour of persons employed on public works, including railways and canals, the expenses are to

be paid by the company carrying on such works.

⁴ "An Act to empower canal companies and commissioners of navigable rivers to vary their tolls, rates and charges on different parts of their navigation" (1845). Sect. 4 saves rights of existing commissioners specifically reserved by their Acts; and by sect. 5 canal companies are subject to a limitation of profits not to raise their dues so as to exceed the maximum of profits.

⁵ "An Act to enable canal companies to become carriers of goods upon their canals." The preamble notices the powers of carrying given to railway companies by divers Acts; and whereas greater competition for the public advantage would be obtained if similar powers were granted to canal and

but subject to the bye-laws of any other company upon whose canal they may act as carriers (sect. 2). Boats and power for hauling and towing vessels of other persons may be provided by companies, who may sue and be sued as carriers, and prefer indictments, and are to be subject to the provisions in force relating to common carriers (sect. 6). Tolls are to be charged equally on all persons, and may be leased by a company (sect. 8), the lessees being deemed collectors of tolls during the lease (sect. 9); and by sect. 7, companies may contract with other companies to facilitate the conveyance of goods. This statute was amended by 10 & 11 Vict. c. 94,¹ by sect. 2 of which canal companies were empowered to borrow money in the manner prescribed by 8 & 9 Vict. cc. 16, 17,² which are incorporated by sect. 3, the rights of existing companies being saved by sect. 2.

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31),³ requires companies to make arrangements and afford all reasonable facilities for receiving and forwarding traffic, without unreasonable delay, and without partiality (sect. 2); and enables parties injured in this respect to apply by motion or summons to a superior Court (sect. 8). By sect. 7, companies are to be liable for neglect or default in the carriage of goods, notwithstanding

navigation companies which have from time to time been incorporated or established under authority of Parliament; but such beneficial purpose cannot be effected without the authority of Parliament, &c. The Act, however, is not to apply to canals vested in shareholders until approved of at a meeting, or, in other cases, by the proprietors, and notice of the determination to adopt the Act shall have been fully advertised (sect. 12). The Act was amended by 21 & 22 Vict. c. 75, entitled "An Act to amend the law relating to cheap trains, and to restrain the exercise of certain powers of canal companies being also railway companies." Sects. 1 and 2 amend the law as to charges; and sect. 3 prohibits canal companies who are also railway companies from taking a lease of canals unless specifically authorized, notwithstanding anything to the contrary in the recited Act.

¹ "An Act to amend an Act to enable canal companies to become carriers of goods" (1847).

² The Companies Clauses Consolidation Act, 1845.

³ "An Act for the better regulation

"of the traffic on railways and canals" (1854). By sect. 1, "*traffic*" includes "not only passengers and their luggage, and goods, animals, and other things conveyed by any railway company or canal company, or railway and canal company, but also carriages, waggons, trucks, and vehicles of every description adapted for running or passing on the railway or canal of any such company;" and "*canal*" includes "any navigation whereon tolls are levied by authority of Parliament, and also the wharves and landing-places of and belonging to such canal or navigation and used for the purposes of public traffic." The expressions "*railway company*," "*canal company*," or "*railway and canal company*," include "any person being owner or lessee of or any contractor working any railway or canal or navigation constructed or carried on under the powers of any Act of Parliament." It has been held that the Railways Clauses Consolidation Act, recited by 8 & 9 Vict. c. 28, are *in pari materia* with this Act. See *Strick v. Swansea Canal*, 16 C. B., N. S. 245; see *post*, Chap. IX.

notice to the contrary, though not beyond a limited amount in certain cases, unless the value be declared at the time of delivery, and extra payment made.

The jurisdiction established under this Act, together with certain powers and duties of the Board of Trade under 26 & 27 Vict. c. 92 (*The Railways Clauses Consolidation Act*), was transferred by sect. 6 of *The Regulations of Railways Act, 1873*,¹ to the Railway Commissioners appointed (by sect. 4) for carrying out the provisions of the two Acts;² and sect. 16 of the Act of 1873 regulates the arrangements between railway companies and canal companies, while sect. 17 provides for the maintenance and due repair of canals or parts of canals by railway companies owning them, or having them under their management. This enactment, together with *The Board of Trade Arbitrations Act, 1874*,³ constitute *The Regulations of Railways Acts, 1873 and 1874*, by sects. 6 and 7 of the latter of which the Board of Trade is empowered to appoint the Railway Commissioners arbitrators or umpires, where any difference arises to which a railway company or canal company is a party, and is required or authorized, under the provisions of any general or special Act, passed either before or after this Act, to be referred to the arbitration or determination of the Board of Trade, the commissioners having the same powers of decision, of rescinding, or varying, or adding to any award or decision previously made by any arbitrator as the original arbitrator.

These Acts were amended,⁴ and the law still further consolidated, by *The Railway and Canal Traffic Act, 1888* (51 & 52 Vict. c. 25), sect. 1 of which enacts that it is to be construed as one with *The Regulation of Railways Act, 1873*, and the Acts amending it; and that it may be cited in conjunction with these Acts as *The Railway and Canal Traffic Acts, 1873 and 1888*.

Part I. reconstitutes and prescribes the powers of the Railway Commission, which consists of two appointed and three ex-officio

The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25).

¹ 36 & 37 Vict. c. 48 (1873), "An Act "to make better provision for carrying into effect the Railway and Canal Traffic Act, 1854, and for other purposes connected therewith."

² By sect. 5, no commissioner is to be interested in railway or canal stock.

³ 37 & 38 Vict. c. 40 (1874), "An Act "to amend the powers of the Board of Trade with respect to inquiries, arbitrations, appointments, and other matters under special Acts, and to

"amend the Regulations of Railways Act, 1873, so far as regards the reference of disputes to the railway commissioners in lieu of arbitrators." Sect. 8 enacts, the Act be read as one with 36 & 37 Vict. c. 48, and the two be cited together as the Railways Regulation Acts, 1873 and 1874.

⁴ See as to the portions of the Acts repealed, sect. 59 and sched. of 51 & 52 Vict. c. 25.

Commissioners, in lieu of the three appointed under the Act of 1873.

Part II. deals with traffic facilities, and requires a uniform classification of merchandise, and uniform tolls and rates on railways; and by sect. 36 of Part III., all the provisions of Part II. relating to any railway shall, so far as applicable, apply to every canal company and to every railway and canal company, and the expressions "railway company" and "railway" (unless the context otherwise requires) shall respectively include a canal company or a railway and canal company, and a canal; and the expression "rate" shall include every description of tolls and dues for the use of canals. Sect. 25 enacts that the "facilities for receiving and forwarding traffic," specified in sect. 2 of *The Railway and Canal Traffic Act*, 1854, noticed above¹ shall include "the due and reasonable receiving, forwarding and delivering" by railway and canal companies, at the request of other companies and of individuals "interested in "through traffic," at "through rates, tolls, or fares (in this "Act referred to as through rates);" subject, however, to certain provisions (sub-sects. 1 to 9), as to notice as to the amount of the proposed rate and the route to be taken, &c., &c.

Part III. deals specially with canals. By sect. 37, sect. 15 of *The Regulation of Railways Act*, 1873, is made applicable to the terminal charges of a canal (sub-sect. 1); and the provisions of the Acts of 1888 and 1893, and of *The Railway and Canal Traffic Act*, 1854, with respect to through rates are extended to any canals which, in connection with any river or other waterway, form part of a continuous line of water communication, "notwithstanding that tolls may not be leviable by authority of "Parliament upon such river or other water-way" (sub-sect. 5). Sect. 38 empowers the commissioners, on the application of any person interested in the traffic, to make an order requiring the alteration and adjustment of the tolls, rates or charges levied on canals controlled by railway companies where it is proved to their satisfaction that such rates and charges are calculated to divert the traffic from the canal to the railway to the detriment of the former. Canal companies are required by sect. 39 to make annual returns to the registrar of joint stock companies, stating the name of the company and of its principal officer, and the place of the office; and also to send to the Board of

¹ *Ante*, p. 494.

Trade such returns annually as it may prescribe, showing the capacity of the canal for traffic, and the capital, revenue, expenditure, and profits of the company. The Board of Trade are empowered to make regulations with regard to the publication of the bye-laws of canal companies, which will not be effective until two months after a true copy thereof certified in such manner as they may direct has been forwarded to the Board (sect. 40); and they are also empowered to direct an inspection by an officer appointed for the purpose of the works of any canal which they are informed is in such a condition as to be dangerous to the public or to cause hindrance to traffic (sect. 41). By sect. 42 no railway company or director or officer of a railway may "apply or use or authorize the application or use" of the company's funds (an expression defined to include any funds under its control or administration) for the acquisition of any canal interest without express statutory authority, and any contravention of this provision entails the forfeiture to the Crown of the canal interest purchased, and the repayment of the sums so applied. Canal companies are authorized, by sect. 43, to enter into contracts and arrangements with other companies for the establishment of through tolls; and also by sect. 44, to establish a canal clearing system, to which, when established, the provisions of sects. 11—26 of *The Railway Clearing Act, 1850*, shall, *mutatis mutandis*, apply. Sect. 45 provides for the abandonment, under a warrant from the Board of Trade, of any canal or part of a canal where, on the application of a canal company, it is shown to the Board to be unnecessary for the purposes of public navigation; or, on the application of any local authority, or of three or more owners of lands adjoining, to have been disused for navigation for three years previously; or, that, through the default of the proprietors, it has become unfit for navigation, or caused damage to adjoining lands through the escape of water (sub-sect. 11). In the case of a derelict canal the warrant may be granted on condition that such canal or any part of it, with all or any of the powers relating thereto, shall be transferred to "any person, body of persons, or local authority," and where any such condition is imposed the Board of Trade may, if they think fit, frame and embody a scheme for its management in a Provisional Order (sub-sect. 3). "Canal company" in this part of the Act is defined by sect. 46, as including a "railway and canal company," so far as the expression relates to any canal of any such company.

Carriage of
explosives.

The provisions of *The Explosives Act, 1875* (38 & 39 Vict. c. 17),¹ concern navigable rivers and canals. Sect. 35 (part 1), empowers railway and canal companies, with the sanction of the Board of Trade, to make bye-laws² for the conveyance, loading, and unloading of gunpowder; and by sect. 39 (part 2), the regulations as to gunpowder are applied to other explosives.³

By sect. 108, "*carrier*" is defined as including all persons carrying goods or passengers for hire, by land or water; and "*canal company*" to mean "any person or body of persons corporate or unincorporate, being owner or lessee, or owners or lessees, of, or working, or entitled to charge tolls for the use of any canal in the United Kingdom, constituted or carried on under powers of any Act of Parliament, or entrusted with the duty of conserving, maintaining, or improving the navigation of any inland water; and every such canal and inland water under the control of a canal company, as above defined, and any wharf, dock, pier, jetty, and work, in or at which barges do or can ship or unship goods or passengers, and other area, whether land or water, which belong to or are under the control of such canal company, are in the other portions of this Act included in the expression '*canal*.'"⁴

Canal Boats
Acts, 1877
and 1884.

The Canal Boats Acts, 1877 and 1884 (40 & 41 Vict. c. 60,⁵ and 47 & 48 Vict. c. 75), are designed to ensure that adequate accommodation should be provided and due attention paid to sanitation on canal boats used as dwellings.

By sect. 1 of the Act of 1877 canal boats used as dwellings are to be registered as required by the Act; and failure to comply with its provisions renders the master and owner⁶ each liable to a fine not exceeding 1*l.* for each occasion on which the boat is

¹ "An Act to amend the law with respect to manufacturing, keeping, selling, carrying, and importing gunpowder, nitro-glycerine and other explosives."

² See also Rules and Bye-laws on this subject for the River Thames of 1875 and 1878.

³ Part III. deals with the administration of the law; the Secretary of State being empowered by sect. 53, and the Board of Trade by sect. 58, to appoint inspectors.

⁴ "*Inland waters*" means "any canal, river, navigation, or water which is not tidal water;" "ship" includes "any description of vessel

"used in sea navigation, whether propelled by oars or otherwise;" and "*boat*" means "any vessel not a ship as above defined, which is used in navigation in any inland water or harbour, whether propelled by oars or otherwise." (Sect. 108).

⁵ "An Act to provide for the registration and regulation of canal boats used as dwellings."

⁶ Sect. 14 defines "*owner*" as "a person who, though only the hirer of a canal boat, appoints the master and other persons working it;" and "*master*" as "the person being for the time in command or charge of the boat."

used as a dwelling; and by sect. 1 of the amending Act, certificates of registry shall cease to be in force in the event of any structural alteration in the boat affecting the conditions under which it was granted. The lettering and numbering of boats must be on both sides of the vessel, and clearly visible from both sides of the canal (40 & 41 Vict. c. 60, s. 3; 47 & 48 Vict. c. 75, s. 7).

The registration authority for the purpose is to be (40 & 41 Vict. c. 60, s. 7) such or more of the sanitary authorities having districts abutting on a canal, as may from time to time be prescribed by the regulation of the Local Government Board; and a canal boat shall be registered with some registration authority having a district abutting on the canal on which such boat is accustomed or intended to ply. Sect. 2 empowers the Local Government Board to make regulations for registration, fixing the number, age, and sex of persons allowed to dwell on a canal boat; and for promoting cleanliness, and preventing infectious disease. By sect. 6, provision is made for enforcing the provisions of *The Education Acts of 1870, 1873, and 1876*,¹ with respect to children dwelling on board canal boats; and by sect. 5 of the Act of 1884, the Education Department is empowered to make regulations as to the form of certificate, &c., to be used by such children.

"Canal" is defined by sect. 14 of 40 & 41 Vict. c. 60 to mean "any river, inland navigation, lake, or water being within the body of a county, whether it is or not within the ebb and flow of the tide;" and the expression "*canal boat*" is stated by the same section to mean "any vessel, however propelled, which is used for the conveyance of goods along a canal as above defined, and which is not a ship duly registered under *The Merchant Shipping Act, 1854*, and the Acts amending the same." By sect. 10 of 47 & 48 Vict. c. 75, however, the Local Government Board are empowered, on the representation of any registration or sanitary authority, or any inspector under the Act, to declare that the Canal Boats Acts shall apply to any vessel or class of vessels which would be within this definition of a canal boat, if such vessel or vessels were not registered under the Merchant Shipping Acts.

¹ 33 & 34 Vict. c. 75, 36 & 37 Vict. c. 86, 39 & 40 Vict. c. 79; "*parent*" is defined by sect. 14 as the "guardian

"and every person liable to maintain. "or who has the actual custody of, a "child."

Canals Protection
(London)
Act, 1898
(61 & 62 Vict.
c. 16).

The Canals Protection (London) Act, 1898 (61 & 62 Vict. c. 16) empowers local authorities within the administrative county of London to require canal companies to protect by fences, gates, or rails, &c., any part of a canal within their jurisdiction or the banks or towing-paths thereof, if they are in the opinion of such authorities so insufficiently protected as to involve danger to human life (sects. 1, 2, 7); and on the failure of the canal company to execute the necessary works, the local authority may execute them and recover the cost from the company (sects. 2, 3, 4).

CHAPTER VIII.

OF FERRIES AND BRIDGES.

THE exercise of the various rights relating to water, which have been noticed in this volume, is connected with certain incidents accompanying their possession. Of these the principal are—

1. The right to the franchise of a *ferry*; 2. *Bridges*, and the duties connected with their erection and repair; 3. *Tolls*, and the liability thereto; and 4. *The rateability* of certain species of the rights above noticed, such as canals, waterworks, docks, &c. It is proposed to consider in the present chapter the laws relating to ferries and bridges, both of which arise from the interruption of a highway on land by a watercourse; and to discuss in the following one those regulating the right to take tolls, and the liability of various rights of water to be rated to the poor.

Incidents to
rights of
water.

Ferries.

A ferry is the right to keep a boat for the purpose of carrying persons or their goods across a river, and to take toll for such carriage.¹

Definition.

It may be created either by royal grant or licence, or by prescription;² but the latter case presupposes an Act of Parliament granting such franchise, without which no ferry can be lawfully set up save by a licence from the Crown.³

How created.

“A man may, under such titles,” says the editor of Stephen’s Commentaries,⁴ “lawfully claim to be the proprietor of a ferry,⁵ though he be not the owner, either of the water over which it

¹ 1 Stephen’s Blackstone, 6th ed. pp. 682, 683; Wharton’s Law Lexicon, 4th ed. p. 391.

² Stephen’s Blackstone, vol. i. p. 682; 2 Inst. 220; *Trotter v. Harris*, 2 Y. & J. 285; 31 R. R. 593; Wharton’s Law Lexicon, p. 391; Woolrych, Law of Waters, p. 36.

³ 1 Stephen’s Blackstone, *supra*; 2 Inst. 220; *R. v. Marsden*, 3 Burr. 1812; Willes, 512, n.; Com. Dig. Piscary, 3;

Hale de Jure Maris, pt. 1, c. 2; *Huzzey v. Field*, 2 C. M. & R. 432 *et seq.*; 41 R. R. 755. See also as to the franchise of a ferry under charter from the Crown, *A.-G. v. Simpson*, (1901) 2 Ch. 671, C. A., *ante*, p. 458.

⁴ Vol. i. p. 682.

⁵ *Newton v. Cubitt*, 12 C. B., N. S. 32; 31 L. J., C. P. 246; 6 L. T. 86; and as to ancient ferries, see *Latton v. Gooden*, L. R., 2 Eq. 123; 35 L. J., Ch. 427; 14 L. T. 296.

The right to
tolls usually
a part of the
privilege,

but it must
be founded on
an adequate
consideration.

Rights of
action of
parties en-
titled to fran-
chise of a
ferry.

"is exercised,¹ or of the soil on either side of the river;² but he must possess over the soil such rights at least as will authorize him to embark and disembark his passengers thereon."³ . . . "The right to take toll also from customers is usually a part of the privilege. . . . But the right of the Crown to authorize the collection of tolls is viewed by the law with a salutary jealousy; so that no burthen of that kind can be imposed on the public, unless it have (in the language of the books) a reasonable commencement,⁴ that is, unless it be founded on an adequate consideration, as between the public and the grantee; which consideration is (in the case of a ferry) to keep up a boat for the passage over a stream not otherwise fordable.⁵ And it is also essential that the burthen be reasonable in its amount,⁶ for where the tolls granted are outrageous, the franchise is illegal and void."⁷

Where the franchise of a ferry exists, the party entitled to it has a right of action, not only against those who refuse or evade payment of toll when due, but also against such as disturb his franchise by setting up a new ferry, so as to diminish his custom,⁸ though he is himself liable to a criminal indictment, if, either wilfully or by his neglect of duty, he obstructs⁹ the subjects of the realm in the lawful use of such ferry.¹⁰

Thus Blackstone says,¹¹ "If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of all the king's subjects;

¹ Com. Dig. in tit. Pisc. 13.

² *Peter v. Kendal*, 6 B. & C. 703; 30 R. R. 504; *A.-G. v. Simpson*, (1901) 2 Ch. 671 (C. A.).

³ *Peter v. Kendal*, *supra*.

⁴ Stephen's Blackstone, vol. i. p. 683; *Mayor of Nottingham v. Lambert*, Willes, 116. A charter from the Crown granting "all our ferriages and passages" over certain rivers conveys only ferries existing at the date of the grant, and does not confer on the grantees the right to create new ferries over these rivers: *Londonderry Bridge Commissioners v. McKerr*, 27 L. R., Ir. 464, C. A.

⁵ *Mayor of Nottingham v. Lambert*, Willes, 116; *Heddy v. Wheelhouse*, Cro. Eliz. 558, 592.

⁶ *Ibid.*; 2 Inst. 219.

⁷ *Ibid.*; Stat. 1 Westminster, c. 31; 2 Inst. 219; Cro. Eliz. 558, 592, *supra*; 2

Bl. Com. 37; Willes, 116, *supra*.

⁸ Stephen's Blackstone, vol. i. p. 683; 2 Roll. Abr. 140; Com. Dig. Action on the Case for a Nuisance (A.); *Blisset v. Hart*, Willes, 503; *De Rutzen v. Lloyd*, 5 A. & E. 456; 44 R. R. 468; *Bridge-land v. Shapter*, 5 M. & W. 375; *Pim v. Currell*, 6 M. & W. 234. As to the setting up of a new bridge taking away custom from another, see *Micklethwaite v. Newlay*, 33 Ch. D. 138.

⁹ Evidence of an obstruction after the suit, and before the declaration, is sufficient to maintain an action for obstructing a ferry: *Foster v. Bonner*, Cowp. 454.

¹⁰ Stephen's Blackstone, vol. i. p. 684; Willes, 512, n.; *Payne v. Partridge*, 1 Show. 231; see also Shep. Com., vol. iii. p. 529, n.; Bl. Com. vol. iii. p. 219; Bracton, l. iv., c. 46; 2 Inst. 567.

¹¹ Com. vol. iii. 16th ed. p. 218.

“otherwise he may grievously be amerced;¹ it would be, therefore, extremely hard if a new ferry were suffered to share his profits, which does not also share his burthen.”

A corporation empowered by statute to establish and work a steam ferry, but on whom no obligation to maintain has been imposed, has not, like the owner of an ancient ferry liable to such an obligation, the right to maintain an action for an injunction to restrain a person who, without any title, has established a ferry which interferes with the profits of the ferry worked by the corporation.²

So a landowner, not the owner of the water or landing-places, has been held³ entitled to compensation under 8 & 9 Vict. c. 20, from a railway company for injuriously affecting his land by obstructing the access to a ferry over the river and appurtenant to the land in question, the ferry being an ancient ferry which had always been attached to a house and premises, the occupier of which had always kept a ferry boat. In this case it was held that a grant of the house and land with its “profits and commodities” might pass the ferry, as there was evidence that they had never been separated—had they ever been separated, plaintiff could not have recovered in respect of injury to his land.⁴

To compensation under 8 & 9 Vict. c. 20.

What will pass a ferry.

Actions for disturbance of a ferry.

In an action⁵ for disturbance of a ferry, the 1st count of declaration stated that plaintiffs were possessed of a ferry across the Tyne between North and South Shields for conveyance of passengers, &c., and that defendant disturbed it by carrying passengers for hire; 2nd count stated a right to ancient ferry. Defendants pleaded, *inter alia*, not guilty, not possessed, and that the boat was under four tons burthen. The Company was incorporated by Act 10 Geo. IV. c. 98, sect. 85 of which enacts that, after the ferry shall be established, no other ferry shall be set up within the said limits; and if any other person shall use any boat or other vessel of the burthen of four tons or upwards, in ferrying for hire across the river, he shall forfeit 5*l*. At the time of passing the statute there was an ancient ferry, which the company under the powers of their Act purchased. It was held:—

1st. That the word “burthen” means not registered admeasurement, but capacity of carrying;

¹ Ibid.; 2 Roll. Abr. 140.

² *Londonderry Bridge Commissioners v. McKeever*, 27 L. R., Ir. 464, C. A.

³ *Reg. v. Great Northern Railway Co.*, 14 Q. B. 25. See, too, *Reg. v. Cambrian Railway*, L. R., 6 Q. B. 422; 40 L. J., Q. B.

169; 25 L. T. 84, where a ferry was held to be “lands,” within sect. 3 of “The Lands Clauses Act, 1845” (8 & 9 Vict. c. 18).

⁴ Ibid.

⁵ *North and South Shields Ferry Co. v. Barber*, 2 Ex. 136.

2nd. That the 85th section did not limit the general right of ferry, but only added a cumulative penalty for persons using boats above four tons burthen ;

3rd. That there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another ;

4thly. That the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not a prescriptive ferry to the exclusion of all private boats, but simply of a ferry ;

5thly. That on purchase of the ancient ferry, and completion of the new one, the former became extinct by operation of the Act of Parliament.

The owner of a ferry¹ obtained an Act of Parliament enabling him to build a bridge instead of the ferry, and to take tolls—and enacting that anyone evading payment of tolls by conveying persons across the river within the limits of the ferry otherwise than by the bridge should forfeit and pay 40s. On motion to restrain a railway company, whose terminus was within the limits of the ferry, from conveying passengers across the river in steamboats ; it was held, that though the Act gave the owner no right of action against persons evading tolls, yet if he were entitled to recover penalties *de die in diem* the Court could protect him by injunction from the infringement of his right.²

Description
and limits of
a ferry.

In *Pim v. Curell*,³ a declaration for infringement of a ferry described the ferry as being across the Mersey, from the township, parish, chapelry, or place of Birkenhead in county Chester to the parish, township, or place of Liverpool in county Lancaster:—Held, 1. That plaintiff might recover on this declaration, although he proved a ferry both ways, for that under the lease of a ferry describing it as a ferry across a river both ways a ferry across a river one way will pass ; 2nd. That the description did not import a ferry from the whole township, &c., of Birkenhead to the whole parish of Lancaster, but that plaintiff might recover on proof of a ferry from any point within Birkenhead to Lancaster.

If there be an exclusive ferry from A. to B., it does not prevent persons from going by any other boat from A. directly to C.,

¹ *Cory v. Yarmouth and Norwich Railway Co.*, 3 Hare, 593.

² See remarks of Wigram, V.-C., as to the balance of convenience and incon-

venience relating to the granting of an injunction. See also *A.-G. v. Birmingham*, 4 K. & J. 528, *ante*, p. 169.

³ 6 M. & W. 234.

though it lie near B., if it be not done fraudulently, and is not a pretence for avoiding the regular ferry.¹

Where² an action by the farmer of a common ferry was brought against another, a waterman, who had lands on both sides of the river three-quarters of a mile from plaintiff's ferry, for ferrying over passengers' horses, &c., it was held that the plaintiff's claim was uncertain and without limits of distance, for by the same reason that defendant may not use a ferry three-quarters of a mile from plaintiff's ferry, by the same he may not use one, two, three, ten or twenty miles off.³

In an action for disturbance of ferry a count alleging that plaintiffs were entitled to a certain ferry across the Thames, and that defendant conveyed passengers and goods across the river near the plaintiff's ferry, was held, after verdict for the plaintiffs, to disclose a sufficient ground of action.⁴

It is sufficient for a plaintiff to prove that he was in possession of the ferry at the time the cause of action accrued, to entitle him to maintain an action for disturbance of it.⁵ From an user of thirty-five years, the jury may presume that a ferry had legal origin.⁵ A variation in the amount of ferriage will not avoid the franchise.⁵

The owner of a ferry demised it by parol to A. at a certain annual rent. A., at the end of a few weeks, proposed to become the servant of the owner as boatman, and to account to him for all money received. This was assented to, and A. became such servant. It was held, this was a surrender of A.'s interest in law; and also, that neglect of duty on part of owner of a ferry is no answer to the action for disturbance, though the Crown may, on that ground, repeal the grant by *quo warranto* or *scire facias*.⁶

In *Letton v. Gooden*,⁷ upon a bill, by the lessee of the Watermen's Company of the right of plying on Sundays from certain stairs to a certain point across the river, claiming a right of ferry, and seeking to restrain a new ferry which had been established fifteen yards from his ferry; it was proved that the company were licensed by Act of Parliament to appoint watermen to ply on Sundays from such common stairs on the Thames

*Letton v.
Gooden.*

¹ *Tripp v. Frank*, 4 T. R. 666; 2 R. R. 495.

² *Churchman v. Tunstall*, Hard. 162.

³ A decree was, however, granted subsequently in the case by Lord Hale; see *Huzzey v. Field*, 2 C. M. & R. 432; 41 R. R. 755.

⁴ *Blacketer v. Gillett*, 9 C. B. 26

(Potter's Ferry).

⁵ *Trotter v. Harris*, 2 Y. & J. 285; 31 R. R. 593.

⁶ *Peter v. Kendal*, 6 B. & C. 703; 30 R. R. 504.

⁷ L. R., 2 Eq. 123; 35 L. J., Ch. 427; 14 L. T. 296.

as might be appointed; and that any other person, except so appointed, plying on Sundays from such places, was liable to a penalty of 40s. for each offence. It was also shown that the defendants had an ancient ferry from the Isle of Dogs to Greenwich, but not back again.¹ The Court were of opinion that, if plaintiff had the right he claimed, he might come to the Court for an injunction, and would not be left constantly to insist on the penalties under the Act; and further, that the new ferry was so near the plaintiff's that the Court would have restrained it: but it was held that since the plaintiff's right only related to Sundays, and as he was licensed to ply by Act of Parliament, and was under no obligation to keep up the ferry, his right did not stand upon the same footing as an ancient ferry. Kindersley, V.-C., remarked: "Such a right of ferry is an exclusive right or monopoly, and as such, it is in itself an evil, being in derogation of the common right, for by common right any person may carry persons across the river. But as a compensation for this, there is the great advantage to the public, that they have at all times at law, by reason of the ferry, the means of travelling on the king's highway, of which the ferry forms a part, for the owner of the ferry is always under the obligation to provide proper boats with a competent boatman."

*Mathews v.
Peach.*

Sect. 38 of Watermen's Act, 7 & 8 Geo. IV. c. 75, imposes a penalty on owners of boats working boats within the limits of the Act without a licence.

Sect. 99 exempts owners of ferries. It has been held, that the owner of an ancient ferry might exercise the right without a licence; but that where a ferry appeared to have been always exercised from a given landing-place in Middlesex to given landing-places in Kent, the privilege did not protect the owner of such ferry in working a boat from another landing-place in Middlesex distant 800 yards from the ancient one.²

*Huzzey v.
Field.*

Where there is an ancient ferry from A. to B. which leads to a public highway, and another makes a landing-place a short way from B., and carries passengers over from A. to C., from whence they pass to the same highway, upon which the ancient ferry is established, before it reaches any town or village—it is an injury to the ancient ferry.³

¹ See as to this, too, *Giles v. Groves*, 12 Q. B. 721.

² *Mathews v. Peach*, 5 Ell. & Bl. 546.

³ *Huzzey v. Field*, 2 C. M. & R. 432; 41 R. R. 755.

But by the existence of an ancient ferry from one particular point to another, persons are not precluded from using the river as a public highway from or to all the towns or places on its banks, which are not in a line leading from one terminus of the ferry to another.¹

"It is quite clear," said Lord Abinger, C. B.,¹ "that a ferry is "a franchise which none can set up without licence from the Crown, and in the case of a ferry by prescription, a grant or licence is presumed. As early as Year Book 22 *Hen. VI.* 146, "it is thus laid down: 'If I have, of ancient time, a ferry in a "town, and another set up a ferry upon the same river near to "my ferry, so that the profits of my ferry are impaired, I shall "have against him an action on the case;' and Newton says: "The case of a ferry is different from the case of a mill, for you "are bound to sustain the ferry to serve and repair it, in ease of "the common people.' So far the authorities appear to be clear, "that if a new ferry be set up without the King's licence to the "prejudice of the old one, an action will lie, and there is no case "which has the appearance of being to the contrary except *Tripp* "v. *Frank*,² hereafter mentioned. These old authorities proceed "upon the ground—first, that the grant of the franchise is good "in law, being of a sufficient consideration to the subject, who as "he receives a benefit, may have by grant of the Crown a corresponding obligation imposed on him in return for the benefit received. A public ferry, then, is a public highway of a special description, and its termini must be places where the public have rights, as towns, or villis, or highways leading to towns or villis. The right of the grantee is in the one case an exclusive right of carrying from town to town, in the other from one point to the other."

In *Newton v. Cubitt*,³ Willes, J., observed: "A ferry exists in "respect of persons using a right of way where the line of way is "across water. There must be a line of way on land coming to a landing-place on the water's edge, or, where the ferry is from "or to a vill, from or to one or more landing-places in the vill. "The franchise is established to secure convenient passage; and "the exclusive right is given because in unpopulous places there "might not be sufficient profit to maintain the boat if there was

Newton v. Cubitt.

¹ *Huzzey v. Field*, 2 C. M. & R. 432; ³ 12 C. B., N. S. 32; 31 L. J., C. P. 41 R. R. 753. 246; 6 L. T. 86.

² 4 T. R. 666; 2 R. R. 495.

"no monopoly. The ferry is unconnected with the occupation of land, and exists only in respect of the persons using the right of way. The questions whence they come and whither they go are irrelevant to the exercise of that right, and the ferryman has no inchoate right in respect of any of them unless they come to his passage. Such being the nature of a ferry, the notion that a large area of land should be subject to the servitude, that the owners and occupiers thereof should be prohibited from using the highway of the Thames as they may choose, and should be under an obligation to get to the highway leading from Potter's Stairs across to Greenwich only therefrom, is anomalous."

The above case was an action for infringement of plaintiffs' ancient ferry by carrying in the line of and near to it. The evidence showed a right of ferry in plaintiffs from a point in the Isle of Dogs, called Potter's Ferry, to Greenwich, and that down to 1812 there was only one public road across the island—i.e. from Poplar to Potter's Ferry—but that since then many houses, &c. had been built in the island. Defendants erected a pier 1280 yards from Potter's Ferry Stairs, and by means of a steamboat carried passengers therefrom to Greenwich without any intention of diverting passengers from plaintiff's ferry. There was no public road from this new district to Potter's Ferry:—*Held*, that the evidence only established a right of ferry from Potter's Ferry to Greenwich, and not from the whole Isle of Dogs, and did not show an actionable disturbance of plaintiffs' ferry, though defendants might have occasionally carried a person who came from Poplar.

Building a bridge in the line of or close to an ancient ferry is not a disturbance of the ferry owner's franchise, though this opinion was once expressed in *Reg. v. Cambrian Railway*.¹ This decision was overruled by *Hopkins v. Great Northern Railway*,² in which the rights and duties of ferries are very clearly stated by Mellish, L. J. In this case a railway company under an Act of Parliament constructed across a river, half a mile above an ancient ferry, a railway bridge and foot bridge, the foot bridge being used by persons going to the railway station and also to other places. The traffic across the ferry consequently fell off, and the

Hopkins v. Great Northern Railway Co.
Rights of owners of ferries discussed.

¹ L. R., 6 Q. B. 422.

36 L. T. 898 (C. A.).

² 2 Q. B. D. 225; 46 L. J., Q. B. 265;

ferry was given up, and on the claim for compensation by the owners under the *Lands and Railways Clauses Compensation Acts* (8 Vict. c. 18, and 8 Vict. c. 20), it was held (reversing the decision of the Queen's Bench Division), that no compensation could be recovered,—since, 1st, An action could not have been maintained for disturbance of the ferry in respect of the traffic either by the railway or the foot bridge, if they had been erected without the authority of an Act; 2nd, On the ground that, the injury to the ferry being occasioned, not by the construction, but by the working of the railway, the ferry had not been injuriously affected within the *Lands Clauses Act* or the *Railways Clauses Act*.

Mellish, L. J., who delivered the judgment of the Court,¹ reviewing the facts of the case, said: “We will consider first “that which is by far the most important,—whether an action “could have been maintained in respect of the diversion of traffic “caused by the railway bridge. Now, in order that such an “action may be maintained, it is clearly not sufficient for the “owner of the ferry to prove that something has been done by “which traffic has been diverted from his ferry. He must prove “that his right has been violated. He is the owner of a particular “description of monopoly,² which the law allows to be created “from its being presumed to be for the public advantage; and “to maintain an action he must prove that the defendants have “in substance done that which he has the sole right to do. Now “we apprehend that the owner of a ferry has not a grant of an “exclusive right of carrying passengers and goods across the “stream by any means whatever, but only a grant of an “exclusive right to carry them across by means of a ferry. “In *Payne v. Partridge*,³ it was laid down that the owner of a “ferry could not himself build a bridge in substitution for the “ferry,—which seems a clear decision that he has not a grant “of every mode of carrying goods and passengers across; for if “he had, he would surely be entitled, if not bound, to provide “the best means of crossing. The first grantee of the ferry is “supposed to have represented to the Crown that it would be for “the public advantage that a ferry should be established in the “particular locality, and then, in consideration of the grantee “undertaking perpetually to keep up the ferry, the Crown has “granted to him the exclusive right of ferrying within certain

Owner of a ferry is the owner of a particular description of monopoly for the public advantage. But has not a grant of carrying by any means whatever.

Conditions of grants from the Crown.

¹ Lord Coleridge, C. J., Mellish, L. J., Brett and Amphlett, JJ. A.

² Cf. *Kindersley, V.-C.*, in *Letton v.*

Gooden, L. R., 2 Eq. 123, for which see *ante*, p. 505.

³ 1 Salk. 12.

Extent of protection afforded by the Crown to its grantee.

"limits. There is nothing in the nature of this transaction
 "which would lead me to believe that the Crown intended to
 "guarantee, or had power to guarantee, the grantee of the
 "ferry against changes of circumstances and future discoveries
 "of an entirely different description of transit, by which ferrying
 "might be superseded. The Crown professes to protect the
 "grantee against the competition of other persons who are in
 "the same line of business and do the same thing that he does ;
 "but he appears to run the risk of any change of circumstances
 "which may render ferrying at that place useless.

No action for violations of right otherwise than by means of boats.

"There is no doubt, however, that the right of the owner of a
 "ferry does extend somewhat beyond a mere right to bring an
 "action against persons who have carried goods or passengers
 "for hire by boat, from one terminus of his ferry to the other ;
 "and it is necessary to examine the authorities, for the purpose
 "of seeing what the true limit of the right is. We have not
 "been able to discover that any action has ever been brought
 "by the owner of a ferry against any person for violating his
 "right, otherwise than by means of boats. The authorities,
 "both old and new, are all collected in *Huzzey v. Field*,¹ and
 "*Newton v. Cubitt*,² but they all relate to alleged infringe-
 "ments of the rights of the owner of a ferry, by means of boats.
 "They establish that, although it is laid down in a very early
 "case,³ — 'If I have a ferry by prescription, and another erects
 "'another ferry on the same river near to it, by which my ferry
 "'is injured, that is a nuisance to me ; for I am bound to
 "'sustain and repair the ferry for the ease of the lieges ; other-
 "'wise I shall be grievously amerced,'—and there are other
 "authorities to the same effect ; yet it does not conclusively
 "follow, as a matter of law, that, because a new ferry diverts
 "some of the traffic from an old ferry, it is actionable ; and it
 "may be that no action can be maintained in respect of the new
 "ferry, if it has been set up *bonâ fide*, for the purpose of accom-
 "modating a new and different traffic from that which was
 "accommodated by the old ferry. In *Newton v. Cubitt*,² there
 "were two counts : the first complaining that the defendants had
 "carried passengers in the line of the plaintiff's ferry : the
 "second, that they had so done near the said ferry, for the pur-
 "pose of evading it ; and Mr. Justice Willes, after showing that

¹ 2 C. M. & R. 432 ; 41 R. R. 755.

² 12 C. B., N. S. 32 ; 31 L. J., C. P.

246.

³ Roll. Abr. 140.

"the defendants had not carried passengers in the line of the
 "plaintiff's ferry, says: 'The second count, charging that the
 "defendants carried near the line of ferry, for the purpose of
 "evading it, raises another question. The owner of the ferry
 "has a cause of action for carrying in the line of the ferry,
 "whether it be done directly or indirectly. He has a right to
 "the transport of the passengers using the way; and if the
 "alleged wrongdoer makes a landing-place near to the ferry land-
 "ing-place, so as to be in substance the same, making no
 "material difference to travellers, such a wrongdoer would be
 "guilty of the wrong complained of in the second count; he
 "would indirectly carry in the line of the plaintiff's ferry.'¹
 "Further on he says: 'The principle by which to decide,
 "whether the proximity of a new passage across the water to an
 "ancient ferry is actionable, has not been clearly laid down.
 "It seems reasonable to infer that if the franchise of a ferry is
 "established for facility of passage, and if the monopoly is given
 "to secure convenient accommodation, a change of circum-
 "stances creating new highways on land would carry with it a
 "right to continue the line of those ways across a water high-
 "way; and it is obvious that the single landing-place which
 "sufficed for an uninhabited marsh, would be utterly inade-
 "quate for several towns thronged with industrial mechanics.'
 "Now this being the result of the authorities, it seems to us by
 "no means clear that a person building a bridge over a stream,
 "even in the line of a ferry, would be liable to an action by the
 "owner of the ferry. It is true that the opening a new bridge
 "might be as prejudicial, or indeed, much more prejudicial, to
 "the property of the owner of the ferry, than the setting up of
 "a rival ferry; but one does, and the other does not, involve the
 "direct doing of the very thing, the exclusive right to do which
 "has been granted to the owner of the ferry; and it seems to be
 "extending the principle of liability for an indirect violation of
 "the rights of the owner of a ferry to an unreasonable extent, to
 "hold that it extends to make a person liable to action, who has
 "not ferried or carried passengers by boat at all."

After noticing that the railway bridge in question did *not* join
 the highway on which one terminus of the ferry was situate to the
 highway on which the other terminus was situate, and that the
 passengers and goods conveyed over the railway bridge did not

¹ 12 C. B., N. S. at p. 59; 31 L. J., C. P., at p. 253.

use the highway on each side of the river adjoining the ferry at all, his Lordship points out that the passages cited from Mr. Justice Willes' judgment in *Newton v. Cubitt* seem strongly in the defendants' favour, and continues: "From what is there said, it would follow that, even if the railway bridge had never been made, but the railway company had established a new ferry for the purpose of conveying goods and passengers from their railway on one side of the river, to their railway on the other side, it would not have been actionable, for the railway would have been a new highway on land, which a change of circumstances had rendered necessary, and it would be reasonable that the new highway should be allowed to be continued over the water highway."

Question of compensation to owners of ferries for loss by creation of new highways considered.

Further on his Lordship thus comments on the question of compensation to the owners of ferries in such cases. "There is another consideration which seems to us to be in favour of the defendants. If owners of ferries are held entitled to compensation, they will certainly form a singular exception to all other persons who were the owners of highways or had a legal interest in the profits to be derived from the use of highways before railways were invented. It can hardly be necessary to enumerate the different classes of persons who had a legal interest in the old highways, and who have suffered loss from the diversion of traffic from those highways to railways; proprietors of canals, turnpike trustees, holders of turnpike bonds, trustees of river navigations, and holders of bonds secured on their tolls. have all suffered great losses from the diversion of traffic to railways, and have received no compensation. No doubt their rights have not been infringed, though their property has been affected. They were all in substance the owners of particular kinds of highway. If any person used their highway without their permission, without paying their toll, the law gave them a remedy; but they had no remedy for a diversion of traffic caused by the invention of a better kind of highway. Is the owner of a ferry in a different position? We think he is not. We think he also is the owner of a particular description of highway, who is entitled to his legal remedy if anybody infringes upon his right, or uses his highway, without paying his toll; but that he, like the others, must bear the loss occasioned by the diversion of traffic caused by the introduction of railways. Another class of persons interested in highways may be

“referred to, more analogous to the owners of ferries. The Crown had exactly the same prerogative respecting bridges that it had respecting ferries. Suppose that the Crown had, in consideration of a person undertaking to keep perpetually in repair a bridge over a stream carrying a highway, granted to such person and his heirs a reasonable toll in respect of all persons and goods passing over the bridge; or, in other words, assume the existence of a good toll thorough in respect of a bridge. The owner of the toll would be possessed of a franchise exactly similar to that of the owner of a ferry, and would be liable to be indicted if he did not keep the bridge in repair; but would he be entitled to compensation on account of traffic being diverted from his bridge by a new railway? It is difficult to suppose that he would, for his right to receive toll in respect of all persons and goods passing over his bridge has not been violated in the least. On the whole we are of opinion that no action could have been maintained by the plaintiff in respect of the railway bridge if it had been opened without the authority of an Act of Parliament.” Their Lordships held, that *Newton v. Cubitt* governed also the question of the footbridge, and ordered judgment with costs to be entered for the defendants.

Prerogative of the Crown as respects owners of bridges similar to that as to ferries.

From the above remarks it will be evident that the owner of a ferry enjoys a monopoly with respect to a certain class of highway, and that though entitled to maintain an action for infringement of his right, he cannot do so for loss of traffic caused by a new highway by bridge or ferry made to provide for a new traffic.

As was stated above, the owner of a ferry is liable for injury to the rights of subjects of the realm for wilful obstruction or neglect of duty.¹

Liability of lessees and owners of ferries for injury by negligence.

In *Willoughby v. Horridge*,² the lessees of a ferry provided steamboats for the conveyance of passengers, goods, and cattle, and also slips for landing and embarking them, which were generally sufficient for that purpose. It was held, that they were liable for an injury to a passenger's horse in consequence of the side rail of the landing slip (of the dangerous state of which they had been forewarned) giving way, although the horse was at the time under the owner's control and management.

¹ See *ante*, p. 502; Stephen's Blackstone, vol. i. pp. 683, 684; Willes, 512, n.; *Payne v. Partridge*, 1 Show. 231; 2

Roll. Abr. 140.

² 12 C. B. 742.

A steam ferry-boat continuing to cross and recross the Mersey during a dense fog takes upon herself the responsibility incident to such a course, and is not entitled to set up public convenience against the probability of loss of life and property, but she will be liable for any damage done to other vessels with which she may come into collision, provided those vessels take the precautions required by law to warn her of their position.¹

A common carrier by water stands on the same footing as a common carrier by land.²

A common carrier by water is on the same footing as one on land, and does not insure against the irresistible act of nature.

The carrier does not insure against the irresistible act of nature, nor against defects in the thing carried itself, or both taken together; and if he can show that either the act of nature or the defect of the thing itself, or both taken together, formed the sole, direct, and irresistible cause of the loss, he is discharged.³

In *Walker v. Jackson*, it was held, that a contract to carry and land a carriage and jewellery, could not be implied from the mere character of the defendants as owners of the ferry, but that it was a question for the jury whether there was in fact such a contract.⁴ The plaintiff went on board defendants' steam ferry-boat with his horse and carriage, paying defendants' charge for a light four-wheeled phaeton. Jewellery and watches of great value were in a box under the seat, which defendants did not know. The carriage was taken safely across the river, but on landing fell into the river and the jewellery was injured. It was held, that the plaintiff's right of action was not affected by his not having communicated the fact that the jewellery was in the carriage: that if a contract to land was established, it was a question for the jury whether the landing was complete under the circumstances; and also that to rebut usage to take and land carriages, a notice not visible to those who came in carriages, that defendants did not undertake to land carriages and would be responsible for no injury, was not admissible.

Neglect of duty will not justify disturbance.

To an action on the case for disturbance of the plaintiff's ferry by the defendant plying a boat from and to the same places, from and to which the plaintiff's ferry plies, it is no answer to prove that plaintiff had neglected his ferry to the inconvenience of the public before the establishment of that

¹ *The Lancashire*, 2 Asp. 202.

² *Rich v. Kneeland*, Cro. Jac. 330; Hob. 17.

³ *Nugent v. Smith*, 1 C. P. D. 423; see

the judgments in this case, in which the law as to the liability of carriers was fully reviewed.

⁴ 10 M. & W. 161.

of the defendant, or to show that 2*d.* had been of late demanded and taken by the plaintiff, whereas formerly only 1*d.* was taken.¹

*Anguish v. Ebden*² was an action for toll brought by the owner of an ancient ferry, at the trial of which it transpired that the plaintiff had leased the tolls of the ferry for a term of years, but that the lease was not under seal. The counsel for the defendant submitted that the plaintiff should be nonsuited; but the learned judge was of opinion that tolls lying in grant and not in tenure, no interest in law passed by the agreement for letting the tolls because it was not under seal, and that the action was therefore maintainable. If the plaintiff had sued for an injury done to his interest as a reversioner in the ferry, he would have been defeated for want of proof of an existing valid lease. The plaintiff recovered.

Lord Coke³ defines "*passage*" as a ferry for the passage of men and cattle over water, for which the owner has a toll; but it has been said in an old case⁴ that a ferry is in respect of the landing-place, and not of the water. The water may belong to one and the ferry to another,—as it is of ferries on the Thames, where in some places the Archbishop of Canterbury has the ferry, and the Lord Mayor of London the interest in the water.⁵

The individuals or all the inhabitants of a particular town may, by custom,⁶ have a right of passage over a ferry without paying toll; for such a custom may reasonably have had its origin in an agreement that the inhabitants of the town should be at the charge of procuring the grant, and that, in consideration of that, another should provide a boat and take toll at the ferry of all but the inhabitants, and that they should pass toll free. Such an agreement would be good at this day, and the interest of the owner of the ferry would be encumbered with the discharge of the inhabitants of the town from toll for passing over the ferry in his boat.⁷

¹ *Peter v. Kendal*, 6 B. & C. 703; 30 R. R. 504; see Gunning on Tolls, p. 110. See also *Anguish v. Ebden*, Bury Summer Assizes, 1830, cor. Parke, J.

² Bury Summer Assizes, 1830, cor. Parke, J. Cf. *Duke of Somerset v. Fogwell*, 5 B. & C. 875; 29 R. R. 449; *R. v. North Duffield*, 3 M. & S. 247; see Gunning, p. 111. As to tolls generally, see *post*, Chap. IX.

³ In *Jehu Jebb's case*, 8 Rep. 46; see

Gunning, p. 106.

⁴ *Inhabitants of Ipswich v. Browne*, Saville, 11; see Gunning on Tolls, p. 106.

⁵ Gunning, p. 106.

⁶ Cf. as to this custom *Goodman v. Mayor of Saltash*, 7 App. Cas. 633; *ante*, p. 337.

⁷ *Payne v. Partridge*, Carth. 191; 1 Show. 243, 255; 3 Mod. 289; 1 Salk. 12; Comb. 180; Holt, 6; see Gunning, p. 107.

Bridges.

Definition.

Wharton¹ defines a bridge to be “a building of brick, stone, wood, or iron across a river, ditch, valley, or other place for the convenience, ease, and benefit of travellers.”

Repair at
common law
in early times
part of the
trinoda
necessitas.

In early times the expense of repairing bridges was part of the *trinoda necessitas*, to which, in accordance with feudal laws, every man's estate was subject,—viz. *expeditio contra hostem, arcium constructio, et pontium reparatio*.² According to Blackstone,³ the reparation of bridges included that of roads; and hence every parish is bound to keep the high roads passing through it, and, consequently, the bridges, in good and sufficient repair. But while the care of roads still devolves on parishes, that of bridges has passed for the most part to the counties at large in which they are situate.⁴

Statutory
provisions.
Magna
Charta.

By *Magna Charta*,⁵ it was provided “that no town or freeman shall be distrained to make bridges nor banks but such as of old time and of right have accustomed to make them in the time of King Henry our grandfather;”—and the liability of individuals or particular places to repair *ratione tenure*⁶ was thus fixed, and the feudal burthen somewhat alleviated. The liability of the county at common law to repair was fully affirmed⁷ by the passing of 22 *Hen. VIII. c. 5*,⁸ whereby “justices of peace” were “empowered to inquire of repairs of bridges and award process against offenders as the king's justices of his bench used commonly to do, or as it shall seem by their discretion to be necessary and convenient for the speedy amendment of such bridges” (sect. 1). By sect 2, in order to ascertain what persons shall be liable to the repair of bridges, it is enacted—1st, that if the said bridges are without a city or town corporate, they shall be made by the inhabitants “of the shire or riding within which the said bridge decayed shall happen to

22 *Hen. VIII.*
c. 5.

Sect. 2.

¹ Wharton's Law Lexicon, 4th ed. p. 144.

² Stephen's Blackstone, vol. iii. 6th ed. p. 242; Bl. Com. 16th ed. vol. i. p. 357.

³ Bl. Com. vol. i. p. 357. As in the Roman law: “ad instructiones reparationesque itinerum et pontium nullum genus hominum, nulliusque dignitatis ac venerationis meritis cessare oportet;” c. 11, 74, 4.

⁴ Stephen's Blackstone, 6th ed. vol. iii. p. 242; Viner's Abridgment, Bridges;

and see *Re Newport Bridge*, 2 Ell. & Ell. 377.

⁵ 9 *Hen. III. c. 15* (Ruff.).

⁶ See *Baker v. Greenhill*, 3 Q. B. 148; *Reg. v. Bedfordshire*, 4 Ell. & Bl. 535; Stephen's Blackstone, vol. iii. p. 242; see *post*, p. 538; *Mag. Car.* 9 *Hen. III. c. 15*, applies only to the making and not to the repairing of bridges; *Reg. v. West Riding of Yorkshire*, 5 Burr. 2594.

⁷ 1 Bl. Com. p. 357, n. 15.

⁸ An Act concerning the amendment of bridges in highways.

"be;" 2nd, "If within the city or town corporate, then by the inhabitants of every such city or town corporate;" and 3rd, "If part of any such bridges decayed happen to be one in one shire, riding, city or town corporate, and the other part thereof in another shire, riding, city, or town corporate, or if part be within the limits of any city or town corporate, and part without or part within one riding and part within another, that then, in every such case, the inhabitants of the shires, ridings, or towns corporate shall be charged and chargeable to amend, make, and repair such part and portion of such bridges so decayed as shall be and be within the limits of the shire, riding, city, or town corporate wherein they be inhabited at the time of the same decays."

Sect. 7 makes provision for the repairing of highways at the end, making the liability for repair extend to "such part and portion of the highways in every part of this realm as well within franchise as without, as lie next adjoining to any ends of any bridges within this realm distant from any of the said ends by the space of 300 feet."¹

Of the numerous important statutes relating to bridges,² the

¹ Cf. *Il. v. W. Riding, Yorkshire*, 2 East, 342; 6 R. R. 439; *R. v. Inhabitants of the County of Kent*, 2 M. & S. 513; 15 R. R. 330; *How v. West Riding of Yorkshire*, 7 East, 588; 8 R. R. 688; Bl. Com. vol. i. p. 357, note 15. See also *post*, p. 536.

² The following are some of the principal:—

1 *Ann. st. 1, c. 12* (in Ruff. c. 18).

"An Act to explain and alter the Act made in the 22 Hen. VIII. concerning repairing and amending of bridges in the highways, and for repealing an Act made in 23 Q. Eliz. for the re-edifying of Cardiff Bridge in the county of Glamorgan, and also for changing the day of election of the wardens and assistants of Rochester Bridge."

Sect. 1 recites 22 Hen. VIII. c. 5, and states that the mode of collecting and taking money for the repair of bridges established thereby (viz., through constable or two honest inhabitants) had been found very troublesome, burdensome and chargeable to the several counties, cities, towns corporate, ridings and divisions.

Sect. 3 therefore proceeds to enact, that the justices at general or quarter sessions may assess towns for re-

pair and maintenance of bridges, but that such assessments are to be levied by the constable of each parish, township, hamlet, or vill in such manner as the said justices may direct, and are then to be paid to the high constables of hundreds, who are in their turn to pay the same to such person and persons as the said justices by their order at sessions shall appoint to be treasurers and receivers of the same. The assessments are to be levied by distress and the sale of goods of every person so assessed not paying the same within ten days after demand, rendering the overplus of the value of the goods so distrained to the owner or owners thereof, the necessary charges of making and selling such distress being first deducted.

By sect. 3, high constables, churchwardens, &c., neglecting to assess, &c., are subject to a penalty of 40s., and every treasurer, unduly paying money, to a penalty of 5l.

Fines, &c., are to be returned into the Exchequer, paid to treasurers appointed by quarter sessions, and applied in repair of bridges, &c. (sect. 4).

Sect. 5 provides that matters concerning such repairs are to be determined in the county where they lie, and not elsewhere; and that no pre-

22 Hen. VIII.
c. 5, s. 7.

5 & 6 Will.
IV. c. 50,
s. 21.

5 & 6 Will. IV. c. 50 (*The Highways Act*, 1835), requires to be noticed. By sect. 21 it is enacted, "That if any bridge shall hereafter be built, which bridge shall be liable by law to be repaired by and at the expense of any county or part of a county, then and in such case all highways leading to, passing over, and next adjoining to such bridge shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road who were by law before the erection of the said bridge bound to repair the said high-

sentment or indictment for not repairing such bridges or the highways at the end of such bridges shall be removed by *certiorari* out of the said county into any other court.

Sect. 6 regulates the allowance made to persons executing the Act. and sect. 7 permits parties in actions under the Act to plead the general issue.

Sect. 8 provides that neither this Act nor anything therein contained, shall excuse or discharge any particular persons, estates or places from repairing any bridge which they have heretofore usually repaired.

43 Geo. III. c. 59.

"An Act for remedying certain defects in the laws relative to the building and repairing of county bridges and other works maintained at the expense of the inhabitants of the counties in England" (1803).

This Act, called Lord Ellenborough's Act, was passed in consequence of the decision of the Court of Queen's Bench in *Rex v. West Riding, Yorkshire* (2 East, 342; 6 R. R. 439).

Sect. 1 empowers surveyors of county bridges to get materials for the repair of bridges in the same manner as surveyors of turnpike roads, and to remove obstructions and annoyances therefrom in the same manner as surveyors are entitled to do under 13 Geo. III. c. 78.

By sect. 2, the justices at quarter sessions may make orders for the widening and altering the situation of county bridges, and may purchase land for such purposes.

By sect. 3, it is enacted that the right and property of all tools, implements, timber, bricks, stones, gravel, and other materials purchased, gotten, or had, or to be purchased, gotten, or had, by the order of the justices in counties, or the surveyor of county bridges, shall be vested in the said surveyor.

The inhabitants of counties shall and may, by sect. 4, sue for damages

done to bridges, &c., in the name of their surveyor, and shall and may be sued in his name; provided always that every such surveyor in whose name any action or suit shall be commenced, prosecuted, or defended in pursuance of this Act shall always be reimbursed and paid out of the monies in the hands of the treasurer of the public stock of such county respectively all such costs and charges as he shall be put unto or become chargeable with by reason of his being so made plaintiff or defendant therein, and also all the costs and charges of prosecuting any indictment or indictments, or other proceedings against any person or persons whomsoever.

Sect. 5 describes the bridges which inhabitants of counties shall be liable to repair and maintain, it being provided that such bridge must be erected in a substantial and commodious manner, under the direction or to the satisfaction of the county surveyor, or persons appointed by the justices of the peace at the general quarter sessions assembled, or by the justices of the peace of the county of Lancaster at their annual general sessions; see *Rex v. Derby*, 3 B. & A. 147; 37 R. R. 370; *Rex v. Lancashire*, 2 B. & A. 813; 36 R. R. 753; *Rex v. Devon*, 2 N. & M. 212; 39 R. R. 507; *Reg. v. Gloucester*, Car. & M. 516; *Reg. v. Southampton*, 18 Q. B. 841.

Sect. 6 regulates the orders, &c., respecting county bridges in the county of York, and

Sect. 7 provides that the Act shall not extend to bridges repaired by reason of tenure or by prescription.

Other enactments are:—22 Car. 2 c. 12, s. 2; 12 Geo. II. c. 29, s. 14; 14 Geo. II. c. 33; 13 Geo. III. c. 78; 52 Geo. III. c. 110; 54 Geo. III. c. 90; 55 Geo. III. c. 143. See Chambers' "Law relating to Highways and Bridges," passim, for a digest of statutes and cases on this subject.

“ways: provided, nevertheless, that nothing herein contained shall extend or be construed to extend to exonerate or discharge any county or any part of any county from repairing or keeping in repair the walls, banks, or fences of the raised causeways, and raised approaches to any such bridge or the land arches thereof.”¹

By sect. 5 of the same Act, the word “highway” shall be understood to mean all roads, *bridges (not being county bridges)*, carriage ways, cart ways, horse ways, bridle ways, foot ways, causeways, church ways, and pavements; and by sect. 22, it is enacted “that the several powers and authorities hereby vested in the surveyor of highways, as well for the getting of materials as the preventing and removing of all nuisances and annoyances, shall be and the same are hereby vested in the surveyor of county bridges, and the roads at the ends thereof repairable therewith; and the several penalties, forfeitures, matters, and things in this Act contained relating to highways shall be and the same are hereby extended and applied, as far as the same are applicable, to such bridges, and the roads at the ends thereof as aforesaid, the said surveyor or surveyors of county bridges making satisfaction and compensation for all trespass and damage done in the execution of the powers of this Act, in such and the same manner as the surveyors of highways are required to make under the provisions of this Act.”

Sect. 33 of 24 & 25 Vict. c. 97² enacts that—“Whosoever shall unlawfully and maliciously pull or throw down or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping.”³

¹ See, too, Stephen's Blackstone, vol. iii. p. 243.

“relating to malicious injuries to property.”

² “An Act to consolidate and amend the statute law of England and Ireland

³ Cf. sects. 58, 73, and 54 & 55 Vict. c. 69, s. 1. If acts of this kind cause

33 & 34 Vict.
c. 73, s. 12.

By sect. 12 of 33 & 34 Vict. c. 73, it is provided that where a turnpike road shall become an ordinary highway, all bridges which were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly.¹ Provided, however, that, for the purposes of this Act, such bridges shall be treated as if they were bridges built subsequently to the passing of the Highways Act, 1835.

38 & 39 Vict.
c. 55.

The powers of surveyors of highways and of vestries under the last named Act were vested in the urban authorities by the Public Health Act, 1875, who were also empowered to construct or adopt public bridges, &c., over canals and railways and by agreement with the proprietor (sects. 144—148). These powers are now, however, transferred to rural district councils by sect. 25 of the Local Government Act, 1894, which declares such councils to be the successors of the rural sanitary authority and highway authority and also to exercise all powers, duties and liabilities of an urban sanitary authority under sects. 144—148 of 38 & 39 Vict. c. 55.

40 & 41 Vict.
c. 14.

It should be noted that by sect. 1 of 40 & 41 Vict. c. 14,² it is enacted that on the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses, and compellable to give evidence.

41 & 42 Vict.
c. 77.

Sect. 21 of 41 & 42 Vict. c. 77 provides that certain existing bridges may be accepted by county authorities, and by sect. 22, contributions out of county rates towards erecting bridges may be made by the county authorities in accordance with the provisions of sect. 5 of 34 Geo. III. c. 59.³

51 & 52 Vict.
c. 4.

Sect. 3 (viii.) of the Local Government Act, 1888, transfers to the county councils the functions previously exercised by the

death the offender is indictable for murder or manslaughter according to the amount of premeditation; and if done with murderous intent, even if they fail, they are indictable under 24 & 25 Vict. c. 100, s. 15 (Offences against the Person Act, 1861).

¹ "An Act to continue certain Turnpike Acts in Great Britain, to repeal certain other Turnpike Acts, and to

"make further provisions concerning "turnpike roads" (1870).

² "An Act for the amendment of the "law of evidence in certain cases of "misdemeanour."

³ "An Act to amend the law relating "to highways in England, and the Acts "relating to locomotives in roads, and "for other purposes."

justices in quarter sessions with respect to bridges and roads repairable with bridges, and "any powers vested by the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), in the county authority;" and they are empowered by sect. 6 to purchase,¹ or take over on terms to be agreed on "existing bridges not being at present county bridges, and to erect new bridges, and to maintain, repair, and improve any bridges so purchased, taken over, or erected." By sect. 11 (1) the entire maintenance of every main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878 (sect. 20 of which is, by sub-sect. 18, to apply as if enacted in the Act), inclusive of every bridge carrying such road if repairable by the highway authority, is vested in the council of the county in which the road is situate, which is to have the same powers for the purposes of such maintenance and to be subject to the same duties as a highway board, and may also exercise any powers vested in the council for the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly. The Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63) empowers county councils to make and carry into effect agreements with highway authorities and the councils of adjoining counties in relation to the construction, reconstruction, alteration, or improvement, or freeing from tolls, of any main road or other highway, or of any bridge (including the approaches thereto), wholly or partly situate within the jurisdiction of any one or more of the parties to the agreement, the expenses being defrayed as part of those incurred in relation to the maintenance of bridges, main roads, and other highways in such proportion as shall be determined by the agreement. It is, however, provided that a highway board may, with the approval of the county council and the assent of such parish or parishes in vestry assembled, charge such expenses or any part thereof on any parish or parishes specially benefited by the construction, alteration or improvement (sect. 3).

54 & 55 Vict.
c. 63.

The general mode in which the common law liability with regard to bridges has been confirmed and amplified by statutes

¹ The quarter sessions boroughs included in sect. 35 of the Local Government Act, 1888, are not liable to contribute to the cost of maintaining or erecting county bridges which have been purchased, taken over, or erected by the County Council under sect. 6 of the Act.

Such expenses are "special" and not "general" county purposes within the meaning of sect. 68 of the Act: *Bury St. Edmunds Corporation v. West Suffolk County Council*, 67 L. J., Q. B. 750; (1898) 2 Q. B. 246; 78 L. T. 624.

having been thus briefly indicated, it will be necessary to examine more particularly some points *as to such liability to repair*.

A bridge of public utility is to be repaired at the public expense;¹ for, "if a man builds a bridge, and it becomes useful to the county, the county in general shall repair it."²

The onus of repair being therefore divided between the public represented by the county and individuals or bodies of individuals, we shall proceed to consider: (i.) *The liability of the county to repair*; (ii.) *The liability to repair ratione tenure*; and (iii.) *The liability to repair by prescription*.

Under the first heading it will be necessary to examine what is meant by the terms public user, and what structure can legally be described as a bridge, as well as to examine the rules with regard to bridges built under special authority, and the statutory provisions as to public liability.

Liability of
county to
repair.

As a general rule the county is liable to repair bridges built by private individuals before 43 *Geo. III. c. 59*, if the public use such bridges.³

The question of the liability of the county to repair bridges built by individuals was carefully considered in the late case of *Reg. v. Inhabitants of Southampton*.⁴ There, the owners of land on one side of a river made a road across such land and built a bridge connecting such road with an existing highway on the other side of the river, and dedicated both bridge and road simultaneously to the public, who afterwards used the same. The Court of Appeal held,⁵ dissenting in part from the Divisional Court,⁶ that upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to and the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public

¹ *Reg. v. W. R. Yorkshire*, 5 Burr. 2594; 2 Sir W. Bl. 685; Lofft. 238; 2 East, 342; 6 R. R. 439.

² *Ibid.* Per Mr. Justice Aston.

³ If no man, by reason of tenure or otherwise, ought to repair a bridge, the county ought to do it: *County of Huntingdon case*, Pop. 192; *Reg. v. Ely*, 4 New Sess. Cas. 222; 15 Q. B. 827; 14

Jur. 956; 19 L. J., M. C. 223; *Reg. v. Saintiff*, 6 Mod. 255.

⁴ 19 Q. B. D. 590; 17 Q. B. D. 424; see also *Reg. v. Wandsworth*, 1 B. & Ald. 63; 18 R. R. 434.

⁵ *Reg. v. Inhabitants of Southampton*, 19 Q. B. D. 590.

⁶ Same case, 17 Q. B. D. 424.

is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question ; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county.

Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted ; but under very special circumstances the Court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment.

Lord Coleridge, C. J., says :¹ “ The opinions which have
 “ been given by the learned judges before whom this case
 “ has already come seem to be conflicting. I do not stay
 “ to inquire whether my brother Stephen at the first trial
 “ intended to lay it down as a legal proposition that, granting
 “ the building of a bridge by a private person, and that the
 “ bridge when built is of utility to and is used by the public,
 “ those facts would be conclusive against the county on the
 “ question of its liability to repair ; the learned judge is under-
 “ stood so to have laid down the law, and if he did so, we are of
 “ opinion that his view was not correct. Such a view would
 “ involve what we conceive to be the unsound proposition that a
 “ bridge built by an individual merely for his private purposes
 “ would at once become repairable by the county upon its
 “ turning out to be of public utility as evidenced by public user.
 “ If, on the other hand, the learned judges in the Divisional
 “ Court (Wills, J. and Grantham, J.) really did say that, granting
 “ the same premises, there must in addition to evidence of public
 “ user and public utility be some proof of an overt act amounting
 “ to a formal adoption by a body capable of representing and
 “ binding the county, then we think that their judgment cannot
 “ in its breadth be sustained. To say that public user supple-
 “ mented by public utility is no evidence to fix the county with
 “ the liability to repair is too broad.”

Where a bridge has been rendered necessary in consequence of an authorized interference for private purposes with a public highway, and the user of the bridge by the public has been so rendered necessary by such interference, the parties so interfering

Bridges of
public utility.

¹ 19 Q. B. D. at p. 600.

with the original highway, and not the county, are bound to keep the bridge in repair.¹

This principle is confirmed by the remarks of Blackburn, J., in *Reg. v. Kitchener*.² "At common law the highways within a parish or township were repairable by the inhabitants of the parish or township, and where they were carried across small streams the inhabitants of the parish or township were

¹ Where, therefore, to an indictment against the inhabitants of a county for non-repair of a bridge, the plea showed that certain adventurers had, for the purposes of draining lands for their own benefit, and under certain powers vested in them, cut an artificial drain or river, which intersected and obstructed an immemorial highway, and that they had erected the bridge in question over the said drain, in the line of the former highway, and not upon the ancient course of any river, and that the former highway had been thenceforth carried over the bridge; and that after the making of the bridge the said drain and bridge and large quantities of land, for the purpose of draining which the said drain was made, were vested by Act of Parliament in a certain corporation in trust for the said adventurers, with power to the corporation to levy money for maintaining the works, and that the drain was very useful to the adventurers and to the corporation, and had been always maintained for their benefit, and that since the passing of the said Act the drain and bridge had always been vested in the corporation, and retained by them for their own benefit, and for that of the said lands vested in them, and for furthering the purposes of the said corporation, and that the said corporation were liable to repair, and of right ought to repair, the said bridge; it was held that the plea showed a liability in the corporation to repair the bridge, by reason of such bridge having been rendered necessary through the interference for private purposes with a public highway, and that it furnished a defence to the indictment:—Held, also, that the allegation that the bridge and drain were vested in the corporation did not make the plea double: *Reg. v. Ely*, 4 New Sess. Cas. 222. Cf. as to this, *Reg. v. Kent* (13 East, 220; 12 R. R. 330); and *Reg. v. Lindsey* (14 East, 317; 12 R. R. 529); and see also decision mentioned in Roll. Abr. 368, tit. "Bridges," pl. 2; 2 Inst. 761; *Reg. v. Salop*, 13 East, 95; 12 R. R. 307; *Reg. v. Kerrison*, 3 M. & S. 526; 16 R. R. 342; *Reg.*

v. Oxfordshire, 6 D. & R. 321; 4 B. & C. 194; *Reg. v. W. R. Yorkshire*, 2 East, 342; 6 R. R. 439; *Reg. v. Kent*, 2 M. & S. 513; 15 R. R. 330. The dictum in the case 1 Roll. Abr. is:—If a man erects a mill for his own profit, and makes a new cut for the water to come to it, and makes a new bridge over it, and the subjects use to go over this as over a common bridge: this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit. Patteson, J., in *Reg. v. Ely*, observes with reference to the judgment of Lord Ellenborough in *Reg. v. Kent* (2 M. & S. 513; 15 R. R. 330) that—"Lord Ellenborough in delivering judgment seems to admit that it was a decision contrary to the case, 1 Roll. Abr. 368, Bridges, pl. 2: but states that, in reference to the record, Rolle appeared not to have been warranted in the abstract given by him; indeed, that no such question as he supposed had been raised or decided in it. Considering the great learning and accuracy of Rolle, and the greater familiarity which he undoubtedly had with ancient records than could be expected of the Court in Lord Ellenborough's time, so entire a blunder as is charged upon him may well excite surprise, and it was pointed out by Mr. Maude, for the defendants, that whereas Rolle refers to a record of 8 Edw. II., the roll examined by the Court from which an extract is given in 2 M. & S. 520, is of the 6 Edw. II.; and the result of his industrious research leaves it very questionable whether the Court in *Reg. v. Kent* did successfully dispose of the authority in Rolle, &c. . . . It would be safer, therefore, perhaps to rely neither on the case in Rolle, nor in the mere decision in *Reg. v. Kent*, further than as a general affirmation of the general rule."

² 29 L. T., N. S. 697; 12 Cox, C. C. 522; 43 L. J., M. C. 9. As to term highway, cf. *Reg. v. Saintiff*, 6 Mod. 255; Holt, 129; and see *post*, p. 529.

"probably by immemorial custom also liable to repair the bridges. "But the bridges over large streams were repairable by the inhabitants of the county. In the case of *Reg. v. Ely*,¹ it was held that he who, under lawful power, makes an artificial cut through a highway, and in whom the cut is vested for his own advantage, incurs the obligation to repair the bridge over the highway, yet not so as to relieve the parish or township from liability, for the Queen's subjects are not to be deprived of their right of coming on the parish or township to repair."²

A bridge may be a public bridge which is used by the public at all such times as are dangerous to pass through the river;³ but it is competent to a county, upon an indictment for non-repair of a public bridge, to give evidence of the bridge having been repaired by private individuals.⁴

What is a public bridge.

Where a person forty-five years back erected a mill and dam thereto for his own profit, *per quod* he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller afterwards built a bridge over it, which the public had ever since used:—Held, that the county and not the miller were chargeable with the reparation.⁴

A bridge used only on an occasion of floods and lying out of and alongside the road commonly used has been held to be a public bridge;⁵ but a bar across a public bridge kept locked except in time of flood is conclusive evidence that the public have only a limited right to use the bridge at such times; and if an indictment for not keeping it in repair states that it is used by the king's subjects "at their free will and pleasure" the variance is fatal.⁶

¹ 19 L. J., M. C. 233.

² Cf. *post*, pp. 529 *et seq.*

³ *Reg. v. Northampton*, 2 M. & S. 262; 15 R. R. 241.

⁴ *Reg. v. Kent*, 2 M. & S. 513; 15 R. R. 330.

⁵ *Reg. v. Devon*, R. & M. 144 (Abbott).

⁶ *Reg. v. Marquis of Buckingham and others*, 4 Camp. 189; 27 R. R. 530, 531.

In *Reg. v. Devon*, the bridge in question was approached by a causeway lying alongside the main road, which led through a ford close by and below the bridge. The bridge and causeway were open at all times to carriages, &c., but

only used by the public in cases of floods, which rendered the ford impassable, and in high floods the bridge itself was impassable. There was, moreover, no evidence that the bridge had ever been repaired, though its existence was spoken to for sixty or seventy years by old witnesses.

With regard to *Reg. v. Marquis of Buckingham*, the indictment alleged that the bridge was "used for all the liege subjects of our lord the king and his predecessors, with their horses, carts and carriages, to go, return, pass, ride, and labour at their free will and pleasure." Lord Ellenborough

The word "riding" in the Statute of Bridges (22 Hen. VIII. c. 5) is not confined to districts technically called ridings, but comprises every division of a county which corresponds in its definition to a riding.¹ Similarly, a hundred bridge has been held to be a county bridge and not a highway, under 5 & 6 Will. IV. c. 50, and therefore not repairable by a parish.²

County only bound to repair bridges erected over a *flumen vel cursus aque*.

The inhabitants of a county are bound by common law to repair bridges erected over such water only as answers the description of *flumen vel cursus aque* (i.e. water flowing between banks more or less defined), although such channel may occasionally be dry,³ and need not necessarily flow at all times. In such case it is a question of fact whether an arch thrown over a *cursus aque* is such a bridge or not,⁴ and the decision will depend on the evidence brought to prove the repair of the structure, and the nature of the *flumen aque*.⁵

observed—"A bar kept shut and opened "as this is I think conclusively shows "that the public have only a right to "use the bridge at times of flood. It is "easy to see how such a qualified right "might be created, and there is no "objection to its legality. But the indictment sets out a right without limit "or qualification. . . . Therefore, though "the defendants may be bound, *ratione tenuræ*, to maintain this bridge to be "used in times of flood, they must be "acquitted upon the present indictment."

The case of *Rex v. Glamorganshire*, given in a note on *Rex v. W. R. Yorkshire* (2 East, 356, n.; 6 R. R. 450, n.), is instructive on this point.

An indictment having been removed in Hilary Term, 1788, by writ of *certiorari* into the Court of King's Bench against defendants for not repairing a certain public bridge called *Yaispenluich* bridge, erected in the king's highway, across the river Tave; the defendants pleaded, that in the year 1745 Herbert Mackworth, Esq., being seised of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge; and that he and Sir Herbert Mackworth his son, and their tenants of tin works, enjoyed a way over the bridge for their private benefit and advantage; and, therefore, that Sir H. Mackworth ought to repair and *absque hoc* that the inhabitants of the county ought not to repair. The prosecutor replied that the inhabitants

of the county ought to repair. And upon the trial at the summer assizes for the county of Hereford before Lord Kenyon, the facts alleged in the plea were proved, and also that the business of the tin works could not be carried on without the use of the bridge. But it also appearing that the public had constantly used the bridge from the time of its being built, his Lordship directed the jury to find a verdict for the Crown, viz., that the inhabitants of the county were bound to repair—which they did accordingly, and no motion was ever made for a new trial; vide Bac. Abr. 535, C.

¹ *Reg. v. Ely*, 4 New Sess. Cas. 222.

² *Reg. v. Chart, Inhabitants of*, 39 L. J., M. C. 107.

³ *Rex v. Oxfordshire*, 1 B. & A. 289; 35 R. R. 302; *Rex v. Derbyshire*, 2 G. & D. 97; 2 Q. B. 745; 6 Jur. 483; *Rex v. Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208; 1 H. & W. 147; 42 R. R. 329.

⁴ *Rex v. Whitney*, 4 N. & M. 594; 42 R. R. 329. Per Patteson, J.: "With regard to *Rex v. Oxfordshire* (1 B. & A. 289; 35 R. R. 302), I do not understand that case as laying down "that every arch thrown over a *cursus aque* is a bridge, but only as deciding "that in order to constitute a bridge "there must be *cursus aque*."

⁵ "The question," said Lord Tenterden, C. J., in *Rex v. Oxfordshire* (1 B. & A. 289; 35 R. R. 302). "therefore, seems to turn upon the "meaning of the words *flumen vel*

A floating bridge which consists of a vessel propelled by steam from one side of the river to the other, and is kept in its course

A floating bridge is in substance a ferry, not a bridge.

*cursum aque.** Now if these words be considered to denote waters flowing in "a channel between banks more or less defined, although such channel may be occasionally dry—a rule will be established of general and easy application. "If any other sense be put upon the words, great uncertainty and confusion will be introduced. It is of great importance to avoid uncertainty by the establishment of general rules. We think no better or more certain rule can be laid down than that which will be given by the sense thus attributed to the words, and, therefore, that such ought to be considered as the general rule of law. And consequently the verdict should be entered for the defendants, the county not being in our opinion bound to repair the structures in question." In the above case the road by which a bridge was approached passed between meadows which were occasionally flooded by a river, and, for convenient access to the bridge, a raised causeway had been made having arches or culverts at intervals for the passage of the flood water, which were equally necessary to the safety of the main bridge and the causeway; and it was held, as has been stated, that the inhabitants of the county were not bound to repair such arches, being at the distance of more than 300 feet from the end of the main bridge.

This case may be usefully contrasted with *Rea v. Derbyshire* (2 G. & D. 97). There a structure, called Swarkestone Bridge, was 1,275 yards long, and at the eastern end were five arches under which the river Trent flowed, while at the western end were eight arches under one of which a stream constantly flowed. The rest of the structure consisted of a raised causeway at different intervals, in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood. There was no interval of causeway between the arches of the length of 300 feet. The county of Derby

had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge:—Held, that it was properly so described, and that the verdict was properly entered for the Crown.

Lord Denman, C. J., in delivering judgment, said:—"The present case differs from that of *Rea v. Inhabitants of Oxfordshire* (1 B. & A. 289, 297; 35 R. R. 302, 308) in two respects—

- "1st. That it is here found by the case that the 'county of Derby have from time immemorial repaired the whole structure, the road and battlements, from beginning to end, including the whole forty-two arches, as also 300 feet at the eastern extremity of the same, and have at different times, and at a great expense, rebuilt and widened twenty-two of the twenty-nine arches between the eight and five arches;'
- "also, 'that from the year 1750 various parts of the said structure, other than the said five arches over the Trent, have been frequently presented under the name of Swarkestone Bridge by the grand jury as out of repair, and such parts have been repaired accordingly;'
- "whereas in the case of *Rea v. Inhabitants of Oxfordshire*, it was not shown that the disputed arches had been repaired by the county; 2ndly. It appears by this case that there is a constant flow of water under one of the eight contiguous arches at the western end of the structure, which, therefore, would be a county bridge, independent of their connection with the arches over the Trent; and also that most of the other twenty-nine arches are over water continually there, though stagnant, whereas in *Rea v. Inhabitants of Oxfordshire* the disputed arches stood on dry ground, except at times of flood. We do not consider it necessary to consider the second difference, or to examine whether an arch or number of arches constructed across stagnant water,

* In 2 Inst. 701, Lord Coke, in commenting on the Stat. of Bridges 22 Hen. VIII., says the ancient form of an indictment on this statute is:—"Quod pons publicus et communis situs in altâ regiâ viâ super flumen sen cursum aque, &c.;" see 1 B. & A. 294, 301.

In *Rea v. Oxfordshire, Inhabitants of*, a case of a similar nature (1827), Bayley, J., says, "By the Statute of Bridges, the bridge must be in the highway to render the county liable, and the county is liable, because the bridge gives a passage along the highway."

by chains laid down across the bed of the stream, is in substance a ferry, and is not a "bridge" within the meaning of sect. 72 of

"ought to be treated as constituting a bridge, or whether it is necessary that there should be '*flumen vel cursus aquæ*' for that purpose, because we think that the first difference is sufficient to take this case out of the authority of *Rex v. Inhabitants of Oxfordshire*, and to entitle the Crown to our judgment.

"That case was tried twice. Upon the first occasion the indictment treated each of the arches as a separate bridge, and the Court held that to be wrong; but Mr. Justice Bayley, in giving his judgment, used these words (1 B. & A. 299, note): 'It is said that these arches are part of the bridge. There might be strong ground for coming to that conclusion, if it had appeared that they were erected at the same time as the main bridge, or if the inhabitants of the county had from time to time repaired 300 feet of the road beyond these arches, which (if they were part of the original bridge) they would have been liable to do. That is a matter of fact, and ought to have been decided by a jury. We cannot say that they necessarily are part of the bridge; and upon a special verdict we can only draw necessary conclusions.'

"Upon the second occasion (1 B. & A. 289), the judgment treated the whole as one bridge, and the jury found a verdict for the Crown, which the Court set aside as being contrary to the evidence, and ordered a verdict to be entered for the defendants. None of those circumstances which Mr. Justice Bayley had mentioned in his former judgment as forming strong ground for coming to the conclusion that the arches were part of the bridge, were proved on that second occasion.

"Here, on the contrary, it appears that the whole structure has from time immemorial been treated as one bridge; that the whole of it from beginning to end has been immemorially repaired by the county; and, indeed, that twenty-two out of the twenty-nine arches in dispute have actually been rebuilt by the county. The facts, therefore, of this case are conclusive against the defendants to show that the whole structure is one bridge, unless there be some rule of law which, under all and any circumstances, prohibits every part of a structure from being treated as a bridge under which water does not

"flow at all times. No such rule of law is to be found unless it can be deduced from the decision in *Rex v. Oxfordshire*. Looking at all the circumstances of that case, we do not think that any such rule can properly be deduced from that decision. notwithstanding the language used in the latter part of the judgment and the importance attached to the passage from 2 Inst. 701, and to the use of the words '*super flumen vel cursum aquæ*' in ancient indictments. Indeed, the confining of these words to a constant stream or course of water flowing at all times to the exclusion of flood waters, whether rarely or frequently occurring, is not altogether consistent with the doctrine laid down in a case in the same volume of reports, *Rex v. Trafford and others* (1 B. & A. 874; 34 R. R. 680). In that case the ancient course and outlet of flood water had been obstructed by certain fenders or banks, and the Court in giving judgment said, 'Now it has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel, at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the erection and continuance of these fenders cannot be justified. No case was cited or has been found that will support such a distinction.' This view of the law was agreed to by the Court of Exchequer Chamber, as is reported in Bing. 210, though the judgment was reversed from the insufficiency of the special verdict. Now, if it be unlawful to obstruct the accustomed course of flood waters which flow only occasionally, it is difficult to see why a structure of arches made to carry a highway in such a manner as to permit flood waters to flow in their accustomed course should not be treated as a bridge, though at ordinary times there may be no water under them. At any rate, where, as in the present case, such arches are contiguous to, and, as it were, the continuation of, an acknowledged county bridge, and have been immemorially treated by the county as part of the bridge, no rule

the Mutiny Act (27 *Vict. c. 8*), which exempts from the payment of any duties or tolls on embarking or disembarking from or upon any pier, wharf, quay, or turnpike, or other roads or bridges, otherwise demandable by virtue of any Act already passed or hereafter to be passed.¹

Sect. 7 of 24 & 25 *Vict. c. 70* (*The Locomotive Act*), enacts that where any bridge on a turnpike or other road, carried across any stream, watercourse, or navigable river, canal or railway, shall be damaged by reason of any locomotive passing over the same, or coming into contact therewith, none of the proprietors, undertakers, directors, conservators, trustees, or other persons interested in, or having charge of, such navigable river, canal, or railway, or of such bridge, shall be liable to repair the damage, &c., but the same shall be repaired to the satisfaction of such proprietors, &c., by the owner or persons having charge of the locomotive at the time of the happening of such damage. This does not apply to county bridges.²

A bridge may be so situate as to be a street within the meaning of a statute.³

A bridge may be a street within meaning of a statute.

An indictment does not lie for not repairing a bridge unless it be in a highway.⁴ "*Highway*" is a general term for all public ways, as well cart, horse and footways,⁴ common to all the King's subjects.

As has been remarked above, if a bridge be of public utility,⁵ and used by the public, the public must repair it; but where a bridge is built by an individual, or body of individuals, for his or their benefit, and constructed without public utility, or in order to restore to the public the use of a public way which such individual or body of individuals has obstructed, then the latter, and not the public, will be liable for the repair of such bridge.⁶

Persons building bridges under special authority for their own benefit primarily liable to repair and maintain them.

"of law prevents our saying that they are so in point of law, as it is obvious that they are in point of fact."

"For these reasons we are of opinion that the whole of this structure must be taken to be one county bridge, and that the verdict entered for the Crown must stand."

¹ *Ward v. Gray*, 13 W. R. 653; 11 Jur., N. S. 738; 34 L. J., M. C. 146; 6 B. & S. 345.

² *Reg. v. Kitchener*, 29 L. T., N. S. 697.

³ *Beaver v. Manchester, Mayor of*, 26 L. J., Q. B. 311; 8 E. & B. 44; 29 L. T.,

O. S. 226.

⁴ *Reg. v. Saintiff*, 6 Mod. 255; Holt. 129; *Reg. v. Salop*, 13 East, 95; 12 R. R. 307.

⁵ A bridge built in a public way without public utility is a nuisance, and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding and repairing it immediately on the county: *Reg. v. West Riding of Yorkshire*, 2 East, 342; 6 R. R. 439.

⁶ *Reg. v. West Riding of Yorkshire*, 2 East, 342; 6 R. R. 439; *Reg. v. Kerrison*, 3 M. & S. 526; 16 R. R. 342; *Reg. v.*

Thus, in the case of *Manley v. St. Helen's Canal and Rail. Company*,¹ a canal company empowered to make bridges (*inter alia*) were held bound to maintain a bridge sufficient for the present state of circumstances of the county and places through which their canal passed, and consequently liable for the death of a person drowned in their canal owing to the insufficient nature of the bridge.

Similarly, a dock company having a swing bridge on a public highway are bound in the passing of vessels to use all reasonable means (both as to the number of men employed, and the number of ships passed at a time) to prevent unnecessary delay; and if they do not do all that can be expected of reasonable men, and any one is obstructed in consequence, such obstruction will make them liable to damages for the injury sustained.²

A dock company being required by statute to build such good and substantial bridges for carriages, horses, and passengers over their cuts as they should deem necessary, and for ever to keep the same in good repair, built bridges sufficient to carry the traffic of the district as it then existed. Subsequently manufactories were established on a tract of land inclosed by their cuts, in which large boilers and engines of twenty tons weight and upwards were constructed, which the bridges were insufficient to carry. *Held*, on rule for mandamus, that the statute did not impose upon the company the duty of providing bridges sufficient to carry such traffic.³

A railway company which is by Act of Parliament authorized to construct any works is bound to construct them in such a way as not to cause a public nuisance, and if the company fails to do so, it will be compelled to alter the works so as to abate the nuisance caused, if it is not the necessary consequence of the exercise of the company's privileges.⁴

Lindsay, 14 East, 317; 12 R. R. 529; *Rex v. Kent*, 13 East, 220; 12 R. R. 530; *Rex v. Somerset*, 16 East, 805; *Manley v. St. Helen's Canal*, 4 H. & N. 840; 27 L. J., Exch. 159; *Wiggins v. Boddington*, 3 C. & P. 544; 33 R. R. 699; *Nicholl v. Allen*, 31 L. J., Q. B. 283; 10 W. R. 741; 1 B. & S. 934; 6 L. T., Exch. 699; see *Reg. v. Inhabitants of Southampton*, *ante*, p. 522; as to right of access over land for the purpose of repairing a bridge, see *Micklethwaite v. Newlay*, 33 Ch. D. 133.

¹ 2 H. & N. 840; 27 L. J., Exch. 159.

² *Wiggins v. Boddington*, 3 C. & P. 544; 33 R. R. 699.

³ *Reg. v. East and West India Dock Co.*, 60 L. T. 232; 53 J. P. 277.

⁴ In *Priestley v. Manchester and Leeds Rly.*, 4 Y. & Coll. 62; 2 Rail. Cas. 134, a company having power to build a temporary bridge for certain purposes, were held entitled to use it for other purposes, provided they did not thereby occasion a greater obstruction to the navigation than they otherwise would have done, or continue using it for that purpose after the per-

The Furness Railway Company was by a special Act authorized (*inter alia*) to divert a road and to carry it under the railway by means of a bridge. The bridge was not constructed of the width and height prescribed by *The Railway Clauses Consolidation Act*, 1845, sect. 49; and the road beneath the bridge was made of so low a level that it was often flooded, and the passage of foot passengers and the traffic of goods thereby much impeded:—Held, that a mandatory injunction must issue to compel the company to construct a bridge of the prescribed width and height from the surface of the road, such road being of a proper level, so as not to be subject to frequent inundations.¹

Still though corporate bodies or individuals making bridges under special authority (or by Act of Parliament) primarily for their *own benefit*, will be bound to repair them, though the public use them;² they will not be so liable where such body or individual is specially authorized to do works for *the public benefit* only,³ or where it can be shown that the particular liability has been by statute or otherwise shifted on to the public.⁴

But not where the special authority is to do works for the benefit of the public.

Hence, in *Rex v. Oxfordshire*,⁵ where a county indicted for non-repair of a bridge in a public highway pleaded that such bridge was erected by trustees under an Act of Parliament, directing them to repair the said road, and empowering them to make and repair bridges, and therefore the said trustees, and not the county, were liable to repair; it was held that the bridge being built for public purposes, in a public highway, the common law liability to repair attached upon the inhabitants of the county as soon as it was built; and that the plea was clearly insufficient to exonerate, as it did not aver that the trustees had funds adequate to the repair of the bridge.⁶ Bayley, J., remarked,

manent bridge was finished, and an injunction against their erection of a temporary bridge was dissolved. As to a girder bridge erected in lieu of an arch, see *Burnley Co-op. Society v. Pickles*, 77 L. T. 803.

¹ *A.-G. v. Furness Rail. Co.*, 38 L. T., N. 8. 555; see, too, on this point, *Smith v. Midland Rail. Co.*, 37 L. T., N. 8. 224; *Mansey v. North Eastern Counties Rly.*, 2 Rail. Cas. 380; *A.-G. v. Mid Kent Rail. Co.*, L. R., 3 Ch. App. 100.

² *Reg. v. Ely*, 4 New Sess. Cas. 222; *Rex v. Kent*, 13 East, 220; 12 R. R. 330; *Rex v. Kerrison*, 3 M. & S. 526; 16 R. R.

342; *Rex v. Lindsay*, 14 East, 317; 12 R. R. 529.

³ *Rex v. Oxfordshire*, 4 B. & C. 194; *Reg. v. Middle Level Commissioners*, 10 L. T., N. S. 375, Q. B.

⁴ *Reg. v. Southampton*, 18 Q. B. 841; 17 Jur. 254; 2 L. J., M. C. 201; *Nicholl v. Allen*, 31 L. J., Q. B. 283.

⁵ 4 B. & C. 194; 6 D. & R. 231.

⁶ Semble, that if that fact had been averred and proved, still the county would have been primarily liable, and must have taken their remedy against the trustees. See, too, *Reg. v. Kitchener*, 29 L. T., N. S. 697.

"*Rex v. Inhabitants of Kent*,¹ and *Rex v. Inhabitants of Lindsay*,² "are distinguishable. In each of those cases power was given "to a canal company to destroy fords, and make, repair, and "alter bridges, in each a ford had been rendered impassable, "and a bridge erected by the company. The bridges so erected "were for the private benefit of the company, and it was pro- "perly held that the county was never liable to repair."³

So, too, where a private individual was empowered under an Act to build a bridge useful for the public, and to take tolls for the same, and when the said bridge should be out of repair was authorized to amend and repair the same, and to substitute a ferry for the bridge during the time of such repair; and where the said private individual was also by a subsequent Act empowered to take increased tolls on account of the increased burden of repair; though it was held by the Court that the builder of the bridge, so long as he remained proprietor and received tolls was liable to an action at suit of a person who suffered special damage from its being impassable, and was bound to repair it, still they refused to grant a mandamus to compel him to repair the bridge and maintain it in a fit state for passage.⁴

¹ 13 East, 220; 12 R. R. 330.

² 14 East, 317; 12 R. R. 529.

³ In *Reg. v. Ely*, 4 New Sess. Cas. 222; and *Reg. v. Kerrison*, 3 M. & S. 526; 16 R. R. 342, defendants cut through a highway, and having rendered it thus impassable, built a bridge to continue the highway.

⁴ *Nicholl v. Allen*, 31 L. J., Q. B. 283; 10 W. R. 761; 1 B. & S. 934; 6 L. T., N. S., Exch. 699.

The liability to repair, which vests in certain special authorities, may be transferred by statute. This point may be illustrated by *Reg. v. Southampton* (18 Q. B. 841; 17 Jur. 254; 2 L. J., M. C. 201). This was a case of indictment for non-repair of three public bridges in the Isle of Wight, in the county of Southampton. The Isle of Wight is a division of the county of Southampton, but has no separate commission of the peace. Before 1842, all public bridges in the island, not repairable by tenure, were repaired either by the tithings, parishes or townships in which they were situate, or from rates levied on all the parishes in the island under the following circumstances:—The island having been assessed to the general county rate, and appeals against such

assessment having been entered, an arrangement was made, in 1774, by consent under an order of quarter sessions, fixing certain proportions to be paid by the parishes in the island towards the general county rate, but leaving the expense of bridges and the house of correction in the island to be raised by a local rate: the island being adjudged and declared not to be liable to pay to the county bridge rate or county house of correction, and the inhabitants agreeing to erect and maintain houses of correction and bridges in the island at their own sole expense. After this arrangement, the practice was for the county quarter sessions, on application of the justices for the Isle of Wight division, to lay a rate in the nature of a county rate on every parish in the island, for the repair of the island bridges and bridewells. Till 1842, there had been no instance of the general county rate being applied to the repair of the island bridges. In 1813, 53 Geo. III. c. cxcii., appointed commissioners for the repair of the highways in the island, with power to make assessments, and enacted that all bridges previously repaired by any parishes, tithings, divisions or townships in the

By sect. 5 of 43 *Geo. III. c. 59*,¹ it is enacted that “no bridge hereafter to be built in any county by or at the expense of *any individual or private person, body politic or corporate*, shall be deemed a county bridge unless erected in a substantial and commodious manner under the direction or to the satisfaction of the county surveyor.”

Statutory limitations as to public liability
43 *Geo. III. c. 59, s. 5.*

Trustees appointed by a local Turnpike Act are individuals or private persons within the meaning of the statute; and a bridge built by them not under the direction or to the satisfaction of the county surveyor, &c., is not a bridge which the inhabitants of the county are liable to repair.²

The section applies only to bridges newly built, and not to a bridge merely widened or repaired since the passing of the Act.³

Trustees under a Turnpike Act having built a bridge across a stream where a culvert would have been sufficient, but a bridge was better for the public, the county cannot refuse to repair such bridge on the ground that it was not absolutely necessary.³

But a bridge having been washed away, and after the passing of the Act rebuilt, wider than before, by the parish, partly with the old materials, and in the same line of passage over the river, but without notice being given to the county surveyor, has been held not to be a new bridge within the meaning of the Act, and that the county were consequently liable to repair it.⁴

In *Reg. v. Gloucestershire*,⁵ a bridge had been built before the

island should, for the future, be repaired “in such and the same manner, and by such and the same ways and means,” as other bridges, “usually called county bridges,” within the island had been accustomed to be repaired. In 1842, and since, the island was assessed generally with the county, and no separate island rate made. Application for the repair of bridges and bridewells in the island had been, since that time, made to county quarter sessions:—Held, that all bridges, which at the time of the passing of the Act were repairable by the tithings, &c., in which they were situate, were for the future repairable by the county generally, and that the arrangement of 1774 did not affect the legal liability of the county, and was no answer to an

indictment against it for non-repair of such bridges.

A footbridge formed of three planks, nine or ten feet long, and a handrail, and which carried a public footpath across a small stream, was held not to be repairable as a county bridge, though it had been repaired by the commissioners under the above-mentioned local Act. See, too, *Reg. v. Middle Level Commissioners*, 10 L. T., N. S. 375.

¹ See *ante*, p. 517, note (2).

² *Reg. v. Derby*, 3 B. & Ad. 147; 37 R. R. 370.

³ *Reg. v. Lancashire*, 2 B. & Ad. 813; 36 R. R. 753.

⁴ *Reg. v. Devonshire*, 2 N. & M. 212; 5 B. & Ad. 383; 39 R. R. 507.

⁵ 2 Car. & M. 506.

Act over a stream of water never known to be dry, though its depth in winter only averaged two and a half feet; it was part of a sheet of water crossing low land at the place where the bridge crossed it, and confined by embankments to prevent it from overflowing the adjoining meadows; and the judge left it to the jury whether this structure were a bridge over a stream of water, for if so, it was not necessary that it should be for the convenience of the public under sect. 5 of 43 Geo. III. c. 59, but the county were liable to repair it.¹

The inhabitants of a county are not liable to widen a public bridge by force of their obligation to repair it.²

"A similar question to this," said Abbott, C. J., in *Rex v. Devon*,³ "came lately before the Court in a case from the county of Lincoln,³ and we then expressed a strong opinion that a

County not bound to widen bridges by force of obligation to repair them.

¹ A bridge in the Isle of Wight, originally repaired by the tithings, was, after the passing of 53 Geo. III. c. cxcii. (by which commissioners for the repair of highways were appointed, and bridges previously repaired by the tithings were made repairable by the county) wholly rebuilt by order of the justices of the island division of the county of Southampton. The new bridge was larger than the old, and different in form, and stood higher up the stream. The expense of the building and repairs were defrayed out of the island rate, imposed under a previous arrangement of 1774, under which bridges in the island were repairable by the tithings. The conditions prescribed by 43 Geo. III. c. 59 were not observed in building it:—Held, that the county was liable to repair the new bridge. (See *Reg. v. Southampton*, 18 Q. B. 841; 17 Jur. 254; 2 L. J., M. C. 201.)

By a local Act of 1807, a road passing over a bridge was made repairable by trustees; but at no time was the bridge or its approaches actually repaired by them. The road became an ordinary highway. By another local Act of the same year, a canal company was empowered to support bridges across their navigation, provided no existing liability to repair a bridge not erected or altered by the company should be affected. The company raised the surface of this bridge without altering the structure, in order to give the approach to another bridge over their navigation the incline required by their Act. They did this without reference to the county surveyor or justices. By 33 & 34 Vict. c. 73. s. 12, where a turnpike road shall have become an ordinary highway, all bridges which

were previously repaired by the trustees of such turnpike road shall become county bridges, and shall be kept in repair accordingly:—Held, that by this alteration the bridge had become repairable by the canal company, and that this general provision of the last Act was not limited to those bridges erected by private expense, which alone were repairable by a county under 43 Geo. III. c. 59, s. 5, nor to bridges which had been actually repaired by trustees: *Reg. v. Somerset*, 38 L. T., N. S. 452, Q. B. Div.

² *Rex v. Inhabitants of Devon*, 7 D. & R. 147; 4 B. & C. 670; 28 R. R. 440, overruling *Rex v. Cumberland*, 6 T. R. 194; 3 R. R. 149, where Lord Kenyon, C. J., laid down that an indictment for not repairing a county bridge may be removed by *certiorari*, notwithstanding stat. 1 Anne, c. 18, s. 5, and those who are bound to repair a bridge are bound to widen it if the exigencies of the public require; Bayley, J., commented on *Reg. v. Stratford*, 2 Ld. Raym. 1169, which had been cited by counsel for the Crown.

³ *Rex v. Inhabitants of Lincoln* (E. T. 5 Geo. IV., May 10th, 1824), where the Court suggested there was no case to be found in which it had been held that a county was liable to widen a public bridge, and intimated a strong inclination of opinion that such a liability did not attach as an incident to the obligation of repair. In *Rex v. West Riding of Yorkshire* (2 East, 353, note (a): 6 R. R. 447, n.), where to an indictment against a riding for not repairing a public carriage-bridge, the plea alleged that certain townships had immemorially used to repair the said bridge; evidence

“county was not bound to make a bridge wider than ever it had been before. . . . The question now is, what extent of charge can by law be cast upon the inhabitants of a county. . . . Now, if we should lay down the law to be, that the inhabitants of a county may be compelled to widen a bridge, I am utterly unable to see why we should not be at liberty to say that the inhabitants of a parish are liable to widen a public highway.”

Where, however, a particular parish was bound by prescription to repair an old wooden footbridge (used by carriages only) in times of flood; and about forty years ago, the trustees of the turnpike road built on the same site a much wider bridge of brick, which was constantly used ever since by all carriages passing that way; it was held, that, to an indictment against the county for not repairing this bridge, a plea that the parish had immemorially repaired, and still ought to repair, the *said bridge*, was not supported by evidence of the above facts; and that the burthen of repairing the new bridge must be borne by the county at large.¹

Sect. 2 of 43 Geo. III. c. 59, enacted that, “Where any bridge or bridges, or roads at the end thereof, repaired at the expense of any county, shall be narrow and incommodious, it shall and may be lawful to and for the ‘justices’ of the county, at any of their General Quarter Sessions, to order and direct such bridge or bridges, and roads, to be widened, improved, and made commodious for the public.” The section also contains a proviso, that “No money shall be applied to the amendment or alteration of any such bridge or bridges until presentment shall have been made of the insufficiency, inconveniency, or want of reparation of such bridge or bridges, in pursuance of some or one of the statutes made and now in force concerning public bridges.”

43 Geo. III. c. 59, s. 2, as to widening bridges.

This section is permissive, and not imperative, and leaves the justices a discretion whether or not to order a bridge to be widened, though it is proved to them to be narrow and incommodious.²

that the township had enlarged the bridge to a *carriage-bridge*, which they had before been bound to repair as a *footbridge*, was held not to support the plea. Where townships have so enlarged a bridge, which they were before bound to repair as a footbridge, they shall

still be liable *pro rata*. Where an individual builds a bridge, which he dedicates to the public, by whom it is used, the county are bound to repair it.

¹ *Hex v. Surrey*, 2 Camp. 455.

² *Re Newport Bridge*, 2 El. & El. 377; 6 Jur., N. S. 97; 29 L. J., M. C. 52;

Approaches to
bridges.

Till 1835 the inhabitants of the county were liable under 22 *Hen. VIII. c. 5, s. 7*, to repair not only bridges, but also the approaches for a distance of 300 feet on either side; and, if indicted for the non-repair thereof, they cannot exonerate themselves, except by pleading specially that some other is bound by prescription or tenure to repair the same.¹ And this liability continues in the case of every bridge built *before that date*. But as regards all bridges built *since* 20th March, 1836, the burden of maintaining approaches and the roadway supported by the bridge is thrown by sect. 22 of the Highway Act of 1835 (5 & 6 *Will. IV. c. 50*) on the highway authority, and not on the county. Under the Local Government Act, 1888, all county bridges are repairable by the county council; and all business formerly done by quarter sessions in respect of bridges and roads repairable with bridges, and all powers vested in the justices of a county by the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c. 77*), are transferred to the county council (L. G. Act, 1888, ss. 3 and 11). Any bridge which is *not* a county bridge must be repaired as it was before the Act. The duty of repairing extends to the repair of all the artificial parts of the structure, and includes rebuilding if necessary; as in the case of the bridge built by Queen Anne at Datchet (*R. v. Inhabitants of Bucks.*)²

Where there is a prescriptive liability to repair a bridge, it is an intendment of law, in absence of any evidence to the contrary, that the liability extends to 300 feet of the approaches of the bridge.³

A new and substantive bridge of public utility, built within the limit of one county, and adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge repairable by the inhabitants of another county, who were bound in course under the statute 22 *Hen. VIII. c. 5*, to maintain such 300 feet of road, though lying in the other county.⁴ In such a case, each is a substantive bridge in a different county, and the bridge cannot be considered as an appendage to the other. The statute of Henry VIII. attaches

¹ 1 L. T., N. S. 1131; cf. *Reg. v. Adderbury East*, 1 D. & M. 324; 5 Q. B. 187; 7 Jur. 1035; 13 L. J., M. C. 91.

² *West Riding of Yorkshire v. Regem* (in error for King's Bench), 2 Dow, 1; 5 Taunt. 284; 7 East, 588; 3 Smith, 437; 14 R. R. 96, 751; *R. v. Gloucester*,

8 L. J. (O. S.), K. B. 97; 33 R. R. 394.

³ 12 East, 192; 11 R. R. 347.

⁴ *Reg. v. Lincoln*, 3 N. & P. 273; 8 A. & E. 65; 1 W., W. & H. 260; 2 Jur. 615, 807; 47 R. R. 484.

⁵ *Rea v. Deron*, 14 East, 477; 13 R. R. 285.

equally on the inhabitants of each county in respect to its own bridge.¹

The liability imposed on a canal company by a private Act of Parliament of "making and perfecting," and maintaining and repairing bridges to carry highways over a canal, includes the liability to maintain and repair raised approaches which are necessary at each end of the bridges.²

Where a railway is carried over a highway by means of a bridge, no liability to keep in repair the immediate approaches on each side of the bridge is cast upon the county by any of the provisions in the *Railway Clauses Consolidation Act, 1845*,³ even though the company have lowered the level of the old highway in making those approaches.⁴

It may sometimes happen that the two parts of a bridge may be situate in different counties,⁵ in which case the liability to repair would be naturally divided between the two counties.⁶

Where the parts of bridges are in different counties.

The statute 5 & 6 *Will. IV. c. 76*, enlarging the boundaries of certain cities and boroughs in England and Wales, for the purposes therein mentioned, does not relieve a county from the repair of bridges situate within the new limits of boroughs, but which, previous to the Act, were without the old limits, and repairable by the county at large;⁷ but where a county of a town has been created by charter and declared to be a separate

¹ *Ibid.*, per Lord Ellenborough.

² *Nottingham County Council v. Manchester, Sheffield, and Lincolnshire Rly.*, 15 R. 35; 71 L. T. 430.

³ 8 Vict. c. 20, ss. 46—65. Sect. 46 imposes no obligation on a railway company to carry a public footpath over the railway, or the railway over a footpath by means of a bridge: *Dartford Rural Council v. Berley Heath Rly.*, A. C. 210 (1898); 67 L. J., Q. B. 231; 77 L. T. 601; see also S. C., 65 L. J., Q. B. 469. As to liability of railway company, who, being authorized to make a level crossing for their own convenience, make a bridge, see *London and North Western Rly. v. Ogwen District*, 80 L. T. 401 (1899), and S. C., 79 L. T. 208.

⁴ *London and North Western Rly. v. Skerton*, 33 L. J., M. C. 158; 5 B. & S. 559. Cf. *Waterford and Limerick Rail. Co. v. Kearney*, 12 Ir. Com. Law Rep. 224, and *Fosherry v. The Waterford and Limerick Rail. Co.*, 13 Ir. Com. Law Rep. 494.

⁵ *Reg. v. New Sarum*, 2 New Sess. Cas.

133; 7 Q. B. 241; 10 Jur. 176; 15 L. J., M. C. 15; *Reg. v. Brecon*, 4 New Sess. Cas. 272; 15 Q. B. 813; 19 L. J., M. C. 203. Cf. *Reg. v. Devon*, 14 East, 477; 13 R. R. 285.

⁶ In *A.-G. v. Forbes*, 3 Myl. & C. 123; 45 R. R. 15, an injunction was granted on an information and bill, upon the ground of public nuisance, to restrain the magistrates of a county from cutting the timbers supporting the roadway of a bridge, which timbers and roadway, at the place proposed to be cut, were within their jurisdiction, but of which the other extremity was within the jurisdiction of a different county.

⁷ *Reg. v. New Sarum*, 2 New Sess. Cas. 133. Referring to this case, Patteson, J., in *Reg. v. Brecon*, 4 New Sess. Cas. 272, said: "In that case, a parish containing 'a bridge was added to an old borough, 'which had never been liable to maintain any bridges, and it would be 'strange to say, that, in such a case, a 'new liability was cast where none had 'existed before.'"

county, the county in which it was originally situated is not liable for repair of a bridge within its boundaries.¹

Where a bridge over the Wye was situated in a certain parish, part of which was on the right and part on the left bank of the river; and where, owing to the passing of 7 & 8 Vict. c. 61, doubts arose as to the liability of two counties on opposite sides of the river to repair the said bridge:—Held, that, in the absence of any words in the Act determining the boundary between the two counties, the ordinary rule of *medium filum aquæ* must apply, and that the middle of the river continuously was such boundary line.²

A bridge at B. was partly within the county of Stafford and partly within the county of Derby. By a local Act the expenses of maintaining it were to be borne in equal moieties by the respective county rates. B. was an urban sanitary district partly within the two counties. Under sect. 50 (1) (b) of the Local Government Act, 1888 (51 & 52 Vict. c. 41), B. became wholly included in the county of Stafford:—Held, that notwithstanding the above section the local Act remained in force, and that both counties were still liable to pay equally for repairs.³

Liability to repair *ratione tenuræ*.

The owner of land is ultimately liable, though primarily the occupier may be.

“With respect to the liability at common law for the repair of “bridges *ratione tenuræ*,” said Lord Denman, C. J., in *Baker v. Greenhill*,⁴ “the result of the authorities seems to be to throw “the charge ultimately upon the owner, though primarily, as “far as the public are concerned, the occupier may be the person “chargeable by indictment in case of non-repair;”⁵ (*The Queen v. Bucknell*,⁶ and the cases there cited); and it would seem “from those authorities, that, if the owner of land charged with “the repair of a bridge *ratione tenuræ* suffer it to be out of repair, “and the occupier of the land be indicted and fined, he would be “entitled to look for reimbursement to the owner who ought to

¹ *Reg. v. Inhabitants of Southampton*, 19 Q. B. D. 590; 17 Q. B. D. 424.

² *Reg. v. Brecon*, 4 New Sess. Cas. 272; 15 Q. B. 813; 19 L. J., M. C. 203.

³ *Staffordshire and Derbyshire County Councils, In re*, 54 J. P. 566 (1890).

⁴ 3 Q. B. 148; 2 G. & D. 435.

⁵ *Rez v. Sutton*, 5 N. & M. 353; 42 R. R. 490; and also *Rez v. Kerrison*, 1 M. & S. 435; 14 R. R. 491; *Rez v. Oxfordshire*, 16 East, 223; 14 R. R. 491; *Rez v. Hayman*, M. & M. 401; 31 R. R. 742; *Rez v. Middlesex*, 3 B. &

Ad. 201; 37 R. R. 396. An owner of lands who is not the occupier of them cannot be charged *ratione tenuræ* with the repair of a *common highway*. Where a highway repairable *ratione tenuræ* is under statutory powers, so altered in its nature and course as to be practically destroyed, the liability to repair *ratione tenuræ* ceases: *Reg. v. Barker*, 25 Q. B. D. 213 (1890).

⁶ 7 Mod. 55, 98; Hawk. P. C. b. 1. c. 77, s. 3, vol. 2, p. 258, 7th ed.

"have it repaired, and who holds the land by the service of
"repairing the bridge."¹

Such appears to be the general rule respecting liability *ratione tenuræ*. Some illustrations of, and exceptions to it, require, however, to be noted.

An infant seised of lands in the actual possession of the guardian in socage,² is not indictable for the non-repair of a bridge *ratione tenuræ*, and the guardian in socage, if in possession of the lands charged with the repairs, is indictable.²

Liability of
an infant
seised of lands
in socage.

An indictment, charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and if judgment be given thereon, upon error brought it will be reversed.³ A count, it appears, charging such an individual, by reason of his being owner of a navigation, under a private Act of Parliament, must set forth the Act. A person who is merely entitled as one of the public to use a bridge carrying the highway over a river is not justified in entering on another person's land and re-erecting the bridge which has been allowed to fall into a state of decay.⁴ Where there is no obligation to repair, there can be (in the absence

Of proprietor
of a naviga-
tion.

Right to
erect a new
bridge.

¹ In this case,—*Baker v. Greenhill*, 3 Q. B. 148,—a landowner, liable, amongst others, to repair a bridge *ratione tenuræ*, demised land; and the lessee covenanted to pay the rent *clear of land tax, and all other taxes and deductions whatsoever, either parliamentary or parochial, taxed or imposed, or to be taxed or imposed, upon the premises, or upon the lessor*, in respect thereof, the landlord's property tax only excepted. A statute, reciting the liability *ratione tenuræ*, and that part of the bridge was out of repair, enacted that landowners liable as above, should repair, and keep in repair, the said parts during the continuance of the Act. On their default, road trustees appointed under the Act were to do the repairs, and recover against owners; a power of distress under a justice's warrant being given to enforce payment; while, for raising the sums required, a power was also given to the landowners, to call meetings, and to meet and make rates according to the value of the chargeable land; such rates to be levied by distress, if necessary. A subsequent Act, reciting the above-mentioned liability, made further provisions as to the holding of such meetings, and levying rates for the said repairs:—Held, that the original liability

for contribution to repairs did not, by these enactments, become a parliamentary tax or deduction within the lessee's covenant; and, therefore (the Court finding no clause in the above statutes which extended the ultimate liability to lessees and occupiers, as well as owners), that the lessee, having been compelled, in the lessor's default, to pay a rate made as above, and charged upon him as lessee and occupier, might (in the manner pointed out by one of the statutes) recover the amount from the lessor.

² Guardian in socage is the next friend in blood to whom the inheritance cannot descend: *Rea v. Sutton*, 5 N. & M., note (a), p. 553; 42 R. R. 490; Lit. 123; Park. 65; Dyer, 359 b; 2 Roll. Abr. 40, 1, 10, citing 27 Edw. III. 79 b of the 1st ed. of the Year Books, being 27 Edw. III. fo. 3, pl. 26, of the 2nd ed.; 14 Vin. 78, pl. 2.

³ *Rea v. Sutton*, 5 N. & M. 353; 3 A. & E. 697; 1 H. & W. 428; 42 R. R. 490. So any occupier of the lands charged. Quære, whether the guardian in socage or other owner of the lands charged *not in possession* would also be indictable.

⁴ *Campbell Darys v. Lloyd*, (1901) 2 Ch. 518.

of special power given) no right to repair, and the default of a local authority cannot extend the burden placed upon the land, or give to other persons a right which would not have existed if the local authority had not been in default.

Collins, L. J., says: "This was an action of trespass by erecting a bridge over the plaintiff's land consisting of one moiety of the bed of the river Irfon in Wales. The defendants' pleas were 'not possessed,' and that there was a highway over the *locus in quo* by means of a footbridge, and the defendants, having occasion to use the said way, entered upon the *locus in quo*, and because the bridge had been destroyed, erected and laid a footbridge across the river, and necessarily did the acts complained of, without unnecessary damage, for the purpose of using the said highway. The jury found the issue on 'not possessed' for the plaintiff, and on the other issue for the defendants. On an appeal by the plaintiff to this Court the finding for the defendants was impeached on various grounds, and in addition it was contended that, even accepting the findings, the defendants were not entitled to judgment. We decided to determine this point first, as, if the defendants are right upon it, it disposes of the action. It was contended for the plaintiff that, assuming it to be the fact that a highway for foot-passengers by means of a footbridge across the river existed, the fact that that bridge had been destroyed gave no right to the defendants to come upon the plaintiff's land and erect a new one. I think this contention is well founded.¹ Even if the right to 'abate' can be said to exist at all in the case of nuisance arising from mere non-feasance, as to which see the argument of Mr. Parke, afterwards Parke, J., and the judgment of Best, J., in the *Earl of Lonsdale v. Nelson*,² I do not think the cases which establish the right to abate by an individual for the purpose of passage would extend to protect such acts as were done by the defendants in this case. If this were the law every individual who was obstructed in his desire to cross would be equally entitled to erect a permanent structure of his own design, although the obligation to repair and the incidental right to determine the method might be in other persons, who, moreover, might be reached by indictment."

Covenant to
build and

On a covenant to build a bridge in a substantial manner, and

¹ *Campbell Darys v. Lloyd*, (1901) 2 Ch. at p. 522.

² 2 B. & C. 302; 26 R. R. 363.

to keep it in repair for a certain time, the party is bound to rebuild the bridge, though broken by an extraordinary flood.¹

"It has been usual," remarked Lord Kenyon, C. J.,² "for many years past, to insert covenants of this kind in contracts for building bridges. . . . The principle stated by the counsel for the plaintiffs³ is the true one; if the defendants had chosen to except any loss of any kind, it should have been introduced into the contract by way of exception. It is sufficient to say here that the contract of the defendants extends to this case; that they have not fulfilled it; and, therefore, that they are answerable."⁴

If A. grants liberty, licence, power, and authority to B. and his heirs to build a bridge on his land, and B. covenants to build the bridge for public use, and to repair it, and not to demand toll, the property in the materials of the bridge, when built and dedicated to the public, still continues in B., subject to the right of passage by the public; and when severed and taken away by a wrongdoer, he may maintain trespass for the asportation.⁵ "They [the materials] were dedicated by him to the public for given purposes; but a *scintilla* of property still remained in him."⁶

An indictment for not repairing a bridge, described as situate within the parishes of Penegoes and Machynleth, and averring that the inhabitants of Penegoes, and the inhabitants of the township of Machynleth, were liable to repair, by reason of the tenure of certain lands, without going on to state what part of the bridge was situate within the township of Machynleth, and that the inhabitants thereof were liable to repair, is erroneous.⁷

repair a bridge, how far binding when damage is done by an extraordinary flood.

If bridge be built by an individual and dedicated to the public, ownership of fabric remains in builder.

Form of indictment for non-repair *ratione tenuræ*.

¹ *Rex v. Kerrison*, 1 M. & S. 435; 14 B. R. 491; cf. *Rex v. Penegoes and Machynleth*, 3 D. & R. 388; 25 R. R. 334; 26 R. R. 294.

² *Brechnock Navigation v. Pritchard*, 7 T. R. 750; 3 R. R. 335.

³ Per counsel for the plaintiffs:—"The distinction taken in the books is 'this: When the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And there-

fore if a lessee covenant to repair a house, though it should be burned by lightning, or thrown down by enemies, yet he ought to repair. (All. 27; Dy. 33 a; Com. Rep. 627; and *Bullock v. Dornmitt*, 6 T. R. 651; 3 R. R. 300). "And here a loss by a flood must have been the very loss in contemplation of the parties." See *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, ante, Chap. III. p. 151.

⁴ For liability for damage by extraordinary floods, see ante, pp. 147 et seq.

⁵ *Harrison v. Parker*, 6 East, 154; 2 Smith, 262; 8 R. R. 434.

⁶ Ibid. per Lord Ellenborough.

⁷ *Rex v. Penegoes and Machynleth*, 3 D. & R. 388; 2 B. & C. 166; 26 R. R. 294.

To an indictment against a county for not repairing a bridge, it was pleaded, that J. S. is liable *ratione tenuræ*:—Held, that this plea was not supported by evidence that the estate of J. S. was part of a larger estate, which part J. S. purchased of the former owner, who retained the rest in his own hands, and, as well before the purchase as since, had repaired the bridge.¹

If a manor be held by the service of tenure of repairing a common bridge or highway, and the manor be divided, the tenant of any parcel, either of the demesnes or services, is liable to the whole charge, but may recover contribution.¹ An agreement by the lord to discharge the purchasers, would only bind him and those who claim under him, and will not affect the remedy of the public. Though the manor comes into the hands of the Crown, yet the duty continues as against every person claiming under the Crown.²

Liability to repair must be immemorial.

An indictment for non-repair of a road or bridge on a liability *ratione tenuræ*, cannot be sustained where it appears that the tenement on which the liability is charged originated within time of legal memory.³ On such an indictment parishioners are admissible witnesses for the prosecution.⁴

In *Rex v. Middlesex*,⁵ it was pleaded to an indictment against the inhabitants of the county for non-repair of a footbridge, that it was parcel of a carriage-bridge which A. B. was bound to repair *ratione tenuræ*. The liability to repair the carriage-bridge, which had been built in 1119, and the repair charged on certain abbey lands of which A. B. was the present proprietor, was

¹ *Rex v. Oxfordshire*, 16 East, 223. But where in this case the county was found guilty, the Court gave leave to stay judgment upon payment of costs until another indictment was preferred, in order to try the liability, Lord Ellenborough, C. J., saying, "But I should be sorry to conclude the county from bringing forward their case, as it is clear they have never repaired."

² *Reg. v. Buccleuch, Duchess of*, 1 Salk. 358.

³ *Rex v. Hayman, M. & M.* 401; 31 R. R. 742. There the indictment alleged that defendant and those whose estate he had of and in a certain mill, from time whereof the memory of man runneth not to the contrary, had repaired, and of right ought to repair, &c. Certain documents of the reign of Henry VIII. were put in for the defendants, which showed conclusively that the mill, by

reason of the tenure of which the obligation was alleged, did not exist before that time; and it was contended that this disproved the liability.

Per Tindal, C. J., "It is essential to prove the liability from time out of memory. This is disproved, and the defendant must be acquitted." See, too, note at p. 403 of report, and *Rex v. Stoughton*, 2 Saund. 158.

⁴ See 54 Geo. III. c. 170, s. 9.

⁵ 3 B. & A. 201; 37 R. R. 396; cf. *Rex v. West Riding of Yorkshire*, 2 East, 359; 6 R. R. 447, n. Per Littledale, J.: "I think the footbridge which was erected in comparatively modern times cannot be considered as having become parcel of the old carriage-bridge repairable by the owners of the abbey lands, but was a distinct structure, and, therefore, that the verdict must stand for the Crown."

admitted; but it was denied that the footbridge was part of the same, and it was proved that the latter had been constructed in 1768 by trustees of a turnpike road with the consent of a certain number of the proprietors of the abbey lands:—Held, that this (being the footbridge mentioned in the indictment) was not parcel of the carriage-bridge which A. B. was bound by tenure to repair, and consequently that the county was bound to repair the footbridge.—Per Lord Tenterden, “Now it is well established “that the inhabitants of a county, though bound to repair a “bridge are not bound to widen.”

On an indictment for the non-repair of a bridge *ratione tenuræ*:—Held, that a record of 18 *Edw. III.*, setting out a presentment of the Bishop of Lincoln for non-repair of the bridge and his acquittal by the jury, which was shortly after followed by a grant of *pontage* from the Crown, on the ground that it had been found by inquest that no one was liable to repair the bridge, is admissible in evidence to negative an immemorial liability *ratione tenuræ*.¹

What is evidence to negative an immemorial liability *ratione tenuræ*.

Where, in an answer to an indictment, it is pleaded that one A. is liable to repair *ratione tenuræ*, evidence of reputation is admissible in proof of such liability.²

Evidence of reputation admissible in proof of liability.

The principle as to prescriptive liability is discussed by Lord Ellenborough in *Rex v. Ecclesfield*.³ Referring to the Statute of Bridges and Magna Charta, he says: ⁴—

Liability to repair by prescription.

“From both which statutes it appears that towns or districts “smaller than a county had been accustomed in some cases to “make bridges; and so, in fact, they continue to do until this “day. And upon the whole it seems manifest that the extent “of the territory chargeable in the case is to be ascertained by “usage and custom, and that in default only of an usage and “custom to charge a smaller territory, the charge shall be upon “the larger, *i.e.*, upon the county”; and he then goes on to draw an analogy between the liability of a parish to repair a bridge and that of a township to repair a road by usage.⁵

¹ *Reg. v. Sutton*, 3 N. & P. 569; 47 R. R. 782. The jury, after finding a verdict of acquittal, also found that the bridge had been recently built, and that no one was liable to repair it. Semble, that such finding by a jury in ancient times is admissible as reputation on questions as to the liability to repair *ratione tenuræ*.

² *Reg. v. Bedfordshire*, 4 El. & Bl. 535; 1 Jur., N.S. 208; 24 L.J., Q. B. 81.

³ 1 B. & A. 348; 19 R. R. 335; *Rex v. Hendon*, 4 B. & A. 628, note (c); 38 R. R. 333.

⁴ Page 359.

⁵ Cf. Blackstone's Com. vol. i. p. 357; 9 Hen. III. c. 15 (Ruff.); 22 Hen. VIII. c. 5.

As stated above,¹ the repair of bridges by tenure or prescription is a remnant of the *trinoda necessitas*, the common law liability of the county not being established fully till the passing of the Statute of Bridges in 22 *Hen. VIII.* c. 5. In such few cases, therefore, as the immemorial custom of repairing a bridge can be proved, it can be pleaded in defence to an indictment.²

A parish may be indictable.

Hence, a parish may be indicted for non-repair of a bridge without stating any other ground of liability than immemorial usage.³

So, too, a hundred.

So, too, a hundred may be charged by prescription with the reparation of a bridge; and this, although it appears that by a statute within time of legal memory one of the townships, parcel of the hundred, was then annexed to it.⁴ In such a case the proper way would be to allege that the corporation had immemorially repaired; and then, however constituted the corporate body may have been at different periods, the allegation would be sustained.⁵

Or a prescriptive corporation.

A charter of Edward VI., granted upon the recited prayer of the inhabitants of the borough of Stratford-upon-Avon, recited that a guild in an ancient borough was founded and endowed with lands, out of the rents and revenues and profits of which a school and an almshouse were maintained and a bridge repaired. That on the dissolution of the guild and the passing of the lands to the Crown, the inhabitants of the borough, reciting that the said borough had from time immemorial enjoyed franchises, liberties, &c., &c., &c., which had been enjoyed by reason of the said guild, and that by the dissolution thereof the borough and its government would fall into a worse state without speedy remedy, &c., &c., prayed to be deemed worthy to be made a body corporate, &c., &c. That they were in consequence granted to be a corporation "*with the same bounds and limits as the borough and the jurisdictions thereof from time immemorial had extended to,*" and that the king, "willing that the almshouse and the school should be kept up and maintained as heretofore

¹ *Ante*, p. 516.

² *Reg. v. Stratford-on-Avon*, 14 East, 348; *Reg. v. Oswestry*, 6 M. & S. 361; 18 R. R. 398; *Reg. v. Hendon*, 4 B. & Ad. 628; 38 R. R. 333; and cf. *Reg. v. Surrey*, 2 C. & M. 455; *Reg. v. Adderbury*, 1 D. & M. 324.

³ *Reg. v. Hendon*, 4 B. & A. 628; 38 R. R. 333.

⁴ *Reg. v. Oswestry*, 6 M. & S. 361; 18 R. R. 398.

⁵ Holroyd, J., in *Reg. v. Oswestry*, 6 M. & S. 361; 18 R. R. 398. See note (a) p. 361 of the report, for form of an indictment against the corporation of Kingston for the non-repair of Kingston Bridge.

“ (but without mentioning the bridge), and that the great charges
 “ to the borough and its inhabitants from time to time incident
 “ might be the better sustained and supported,” granted to the
 corporation the lands of the late guild. By parol testimony it
 was proved that as far back as living memory went, the corpora-
 tion had always repaired the bridge :—Held, taking the whole of
 the charter and the parol testimony together, the preponderance
 of the evidence was, *first*, that this was a *corporation by prescrip-
 tion*, though words of creation only were used in the incorporating
 part of the charter of Edward VI. ; and *secondly*, that the burden
 of repairing the bridge was upon such prescriptive corporation
 during the existence of the guild before that charter ; though the
 guild out of their revenues had in fact repaired the bridge, which
 was only in ease of the corporation and not *ratione tenuræ* ;
 and that the corporation were still bound by prescription, and
 not merely by tenure ; and, therefore, that a verdict against
 them upon an indictment for the non-repair of the bridge
 charging them as *immemorially* bound to repair was sustainable.¹

Where there is a prescriptive liability to repair a bridge, it is
 an intendment of law, in the absence of any evidence to the
 contrary, that the liability extends to 300 feet of the approaches
 at each end of the bridge.²

¹ *Rex v. Stratford-on-Avon*, 14 East, 348 ; cf. *Rex v. Oswestry*, 6 M. & S. 361, note (a) ; 18 R. R. 398.

² *Reg. v. Lincoln*, 3 N. & P. 273 ; 8 A. & E. 65 ; 1 W. W. & H. 260 ; 2 Jur. 615,

807 ; 47 R. R. 484. See remarks of Lord Denman, C. J., therein on the *Abbot of Combe's case*, 43 Assis. pl. 37 ; and on *Rex v. West Riding of Yorkshire*, 7 East, 598 ; 8 R. R. 688.

CHAPTER IX.

OF TOLLS AND RATES.

Tolls and rates how incident to rights of water.

OF the incidents mentioned in the previous chapter, two—viz. *tolls* and *rates*—remain to be noticed. Of these the first-named is naturally connected with the right of navigation, and has been already incidentally alluded to.¹ The second, that of rateability, arises from the improvement of land in value by water which either rises on it in the form of springs, or passes over it in the form of a natural watercourse, or is conveyed over it artificially,—as by open channels or pipes.

Tolls.
Definition.

Toll, *tolnetum*, or *telagium* are all of them terms of the same import, and signify, in a general sense, a sum of money paid by the buyer for exporting or importing goods and merchandise.² Toll has also been defined as “a tribute or custom paid for “passage” ;³ while in the *Termes de la Ley*⁴ it is described as “a “payment used in cities, towns, markets, or fairs for goods and “cattle brought thither to be bought or sold, and is always paid “by the buyer, and not by the seller, unless there is some “custom otherwise.”⁵

Of tolls generally.

Such definitions are, however, as is stated in the authority above quoted, too general for practical purposes ; and the nature of toll will be better understood if we briefly examine the distinction between *toll thorough* and *toll traverse*, the two chief species of toll. This will be conveniently done here, since as the law relating to the taking of tolls for passage on a highway or through a street applies equally to that along the sea or navigable waters, it will be necessary to consider some points relating to the general law of tolls before treating of those incident to various rights of water.⁶

¹ See Chap. I., Chap. V., and Chap. VII., and as to Ferries Chap. VIII.

² Gunning on Tolls, p. 1 ; 2 Inst. 58.

³ Wharton's Law Lex. (Cowel), p. 937 ; Brown's New Law Dict. 362.

⁴ See, too, Gunning, p. 1.

⁵ Gunning, p. 1. A charge for “stopping loading and unloading” is

not a “toll :” *Pryce v. Monmouthshire Canal Co.*, 4 App. Cas. 197 ; 49 L. J., Ex. 130 ; 40 L. T. 630.

⁶ Gunning, p. 214 ; *Haspurt v. Wills*, 4 Vent. 71 ; 1 Sid. 454 ; 1 Mod. 47 ; *Warren v. Prideaux*, 1 Mod. 104 ; *Mayor of Nottingham v. Lambert*, Willes, 111 ; *Truman v. Walgham*, 2

Toll thorough is a sum paid for passage through a highway,¹ or a toll taken from men for passing through a vill in a street,² both of which definitions apply equally to a toll taken for passage over the sea or on a navigable river, or over a public ferry or bridge.³ It cannot be claimed unless the party demanding it can show that the public, whose common law right to a free passage along the highway he seeks to abridge, receive from him a good consideration for the imposition.⁴

Toll thorough,
definition of.

Toll traverse, on the other hand, may be prescribed for by a corporation or an individual without alleging any consideration, and the prescription will be good.⁵ It derives its name from the fact that it is a toll paid for traversing the land of another,⁶ and has been defined as "a sum demanded for passing over the private soil of another,"⁷ and also as "a duty which a man pays for passing over the soil of another in a way not a high street,"⁸ though it may, under certain circumstances, be payable "for passing over the common public highway."⁹

Toll traverse,
definition of.

The distinction between the two species of toll was exhaustively discussed in the judgment of Willes, C. J., in *Mayor of Nottingham v. Lambert*,¹⁰ which was a prescription to take a toll for passing on an ancient navigable river.

The distinction between
the two
species of toll.
*Mayor of Not-
tingham v.
Lambert.*

" . . . A difference has always been taken between *toll thorough* and *toll traverse*. It has been holden several times and by the best authorities that toll thorough cannot be supported without a consideration; but toll traverse may, because it in itself implies a consideration. In the *Book of Assize*, 22 *Edw. III.* c. 58, it is expressly laid down as a rule that toll thorough is against common law and common right, and cannot be supported by usage. It is so likewise holden in *Keilw.* 148, 149, that such toll is not allowable without some particular consideration. It is said in 1 *Leon.* 232, that the king cannot grant toll thorough for passing through a highway, for that is

Wilson, 296; *Hill v. Smith* (in error), 4 Taunt. 520; 10 R. R. 357; *Richards v. Bennett*, 1 B. & C. 223; 25 R. R. 372, &c., &c.

¹ Gunning, p. 2; Com. Dig. tit. Toll (C).

² Ibid. p. 2; Vin. Abr. tit. Toll (A).

³ Ibid.; *Haspert v. Wills*, 1 Vent. 71; 1 Sid. 454; 1 Mod. 47; *Warren v. Prideaux*, 1 Mod. 104; 2 Lev. 96; *Mayor of Nottingham v. Lambert*, Willes, 111.

⁴ Gunning, p. 3; *Smith v. Shepherd*,

Moore, 574; Cro. Eliz. 710.

⁵ Gunning, p. 27; *Truman v. Walgham*, 2 Wils. 296.

⁶ Gunning, p. 26; *Crispe v. Belwood*, 3 Lev. 424.

⁷ Ibid.; Com. Dig. tit. Toll (D).

⁸ Ibid.; Vin. Abr. tit. Toll (A); 22 Ass. 58.

⁹ Ibid.; *Pelham v. Pickersgill*, 1 T. R. 660; 1 R. R. 348; *Brett v. Beales*, 10 B. & C. 508; 34 R. R. 499.

¹⁰ Willes, 111 *et seq.*; see also Woolrych, 302, and Gunning, 22.

“an oppression to the people, for that every highway shall be common to everyone. In 1 Vent. 71, in the case of *The City of Norwich*,¹ such custom was holden to be illegal and unreasonable, unless for such vessels as unloaded at the quay there. In several books it is called *malum tolnetum*, or an outrageous toll, and an oppression on all the subjects of England, which sort of tolls are condemned in *Magna Charta* (9 Hen. III. c. 30), and by the *Statute of Westminster* 1 (3 Edw. I. c. 31), where it is said that if anyone take outrageous tolls contrary to the common law of the realm, if it be in a vill of the king's, the king shall take away the franchise. And this distinction is supported by reason as well as authority; for how can a duty be imposed on all the subjects of England only for enjoying that privilege which is their ancient birthright, and which every subject had a right to before? If, indeed, they receive any particular benefit, as going over a bridge, coming into a quay, wharf, port, or the like, this, indeed, may alter the case; but then this must be particularly shown.² Some cases have been cited to the contrary, but when looked into they either stand on some particular reason which plainly distinguishes them from the common case, or it is only said *obiter* that such tolls may be supported by prescription without any consideration; but the reasons given for it are such as make such dicta of no weight or authority.³ It is said, indeed, in some books, and particularly in the case of *James v. Johnson*,⁴ that if the

¹ *Haspurt v. Wills* (in error), 1 Vent. 71; 1 Mod. 47, *S. C.* (reported by name of *Heshod v. Wills*), 1 Sid. 454. See, too, Gunning, p. 21, Woolrych, p. 302. This was a special action on the case on a custom of wharfage in Norwich. Plaintiff stated in his declaration that he had and maintained a common wharf and crane thereto attached for unloading such goods as were brought up the river in vessels to the city, and custom alleged was that every vessel passing through the river by the wharf paid a certain duty for which the action was brought. The Court held the custom bad and void as to all vessels which did not unload “at the wharf or any other place within the city,” there being no benefit redounding to them from the maintenance of the wharf, they only passing by bound for another place, and they could, therefore, have no imposition on them, but if they had received their

freight at the wharf, it might extend to them. The reports of this case in Vent. and Mod. differ; on which point see Gunning, p. 22, and Woolrych, p. 301.

² *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402. Mayor and corporation of Yarmouth prescribed to have a toll called measurage from every merchant exporting corn or grain from the port of Great Yarmouth to ports beyond the seas, but the consideration was not set forth. There was a demurrer, and it was said that there could not be any thorough toll without a special consideration; but the Court were of a different opinion. See, too, Gunning, p. 23, and Woolrych, p. 301.

³ His lordship then referred to 21 Hen. VII. fol. 16; *Smith v. Shepheard*, Cro. Eliz. 711; *Moor*, 576; *James v. Johnson*, 1 Mod. 232, and other authorities.

⁴ 1 Mod. 232.

"prescription be found (as it is in the present case), it must have
 "a reasonable commencement; but this is laid down generally
 "without consideration, and without distinguishing the nature
 "of the cases. For though this may be true sometimes in the
 "nature of a private right, it is plainly otherwise in the case of a
 "a right to which all the subjects of England are entitled. For
 "if a reasonable commencement be presumed, it must be that it
 "began by agreement, and that such an agreement, being so long
 "ago, cannot be proved well, may be well enough in the case of a
 "private right. But who could agree for all the subjects of Eng-
 "land? They cannot consent to part with their rights any
 "otherwise than by Act of Parliament, in which the consent of
 "everyone is implied. This distinction is obvious, and founded
 "on good sense. . . . In several of the cases cited there is a
 "particular benefit to the subject, as coming into a port, or land-
 "ing on the plaintiff's manor or quay, which distinguishes it
 "from toll thorough. So are the cases *Haspurt v. Wills*,¹
 "*Mayor of London v. Hunt*,² *Crispe v. Belwood*,³ and several
 "other cases which were cited.⁴ And there is a further reason
 "to be given for the determination in 3 Lev. 37,—that the duty
 "was claimed by the city of London, whose customs and
 "franchises are all confirmed by Act of Parliament.⁵ In the
 "case of *Wilkes v. Kirby*,⁶ the duty was expressly laid to be paid

¹ 1 Mod. 478.

² 3 Lev. 37.

³ 3 Lev. 424; and cf. *Colton v. Smith*, Cowp. 47; Willes, 117, note (a).

⁴ In *The Mayor of London v. Hunt*, it was objected in assumpsit for weighage of goods brought into the Port of London that there was no consideration for the duty. But as the defendant had the liberty of bringing his goods into port, which is a place of safety, it was resolved that the consideration was implied (3 Lev. 37; see, too, Gunning, pp. 29, 33, 115; and Woolrych, p. 300). In *Crispe v. Belwood*, 3 Lev. 424 (see also Gunning, p. 21; and Woolrych, p. 300), on the other hand, the Court supported the claim of a lord of the manor, to toll for all goods landed *within the manor*, though not upon the wharf, which alone, as appeared by the plea, the lord repaired; remarking that, originally the lord was owner of all the soil in the manor, and that, therefore, the prescription was good in respect of the easement in landing goods on his soil. The case was distinguished from

that of *Warren v. Prideaux*, 1 Mod. 104, which see *post*.

⁵ *Mayor of London v. Hunt*, *supra*.

⁶ 2 Lutw. 1519. This case (also reported 1 Lutw. 490, and see Gunning, pp. 19, 20; and Woolrych, p. 300) was an action of trespass for taking plaintiff's goods at the port of King's Lynn in Norfolk. Defendant justified under a plea of prescription for owners of the port of King's Lynn, to take a certain toll for merchandise loaded there, to be exported from thence by foreigners not free of the borough, and plea alleged that "this was towards the necessary "reparation of the port," and a right to distrain on refusal to pay. On demurrer, it was objected that this was not a good plea, because it was stated only that the toll was towards the reparation of the port, and not that the owners of the port in fact repaired, or were bound to repair, the port, and, in consideration of such obligation, took the toll. It was also objected that the consideration itself was insufficient in law, even if it was well pleaded. The case was not

"*erga reparationem portus*. It is best, therefore, to adhere to the "old rule, which is founded upon the best reason, that toll thorough cannot be maintained without a particular consideration shown."

The principles here stated have been confirmed by subsequent decisions; and there seems no ground for believing, as stated by counsel in *James v. Johnson*,¹ that the terms toll traverse and toll thorough are used promiscuously. Though Woolrych seems not to dissent from that doctrine,² it appears to be satisfactorily refuted by the remarks of Willes, C. J., in the judgment just noticed, who states the distinction between the two "to be "obvious, and founded on good sense;" and according to Gunning on *Tolls*,³ the case of *James v. Johnson* is one of questionable authority.⁴

These authorities seem sufficient to support the distinction above given between toll thorough and toll traverse, the former of which, being contrary to common right,⁵ is treated with great jealousy by the courts,⁶ which will require the person seeking to charge the public with it to prove to their satisfaction a good consideration for it, and such consideration will not be implied even from a prescriptive taking of toll.⁷ It is, however, frequently a right incident to ports, as will be seen later on. Toll traverse, which can only be demanded when it has been used to be taken time out of mind,⁸ and the reservation of which must be contemporaneous with the dedication of the way to the

decided; but the Court (according to Gunning) strongly inclined for the defendant, because he might have been indicted for not repairing the port.

¹ 1 Mod. 232, per Serjeant Maynard.

² Woolrych, p. 303; and see *Steinson v. Heath*, 3 Lev. 400.

³ Gunning, p. 26.

⁴ In *Truman v. Walgham* (2 Wilson, 296), the Court said: "This is a prescription for toll for passing through the King's highway; . . . which cannot be taken unless a good consideration be alleged: the reason is, because it is to deprive the subject of his common right and inheritance, to pass through the King's highway, which right of passage was before all prescriptions [*Smith v. Stephen*, Moore, 574]. Toll traverse, or for going through a man's private land, may be prescribed for, without any consideration, and payment time out of mind is sufficient, and will support the pre-

scription." Cf., too, the remarks of Lord Tenterden, C. J., in *Brett v. Beales*, 10 B. & C. 508; 1 M. & M. 416; 34 R. R. 499; *Hill v. Smith*, 4 Taunt. 520; 10 R. R. 357; Popham, J., in *Smith v. Shepherd*, Cro. Eliz. 710; Moore. 574. See also *Pelham v. Pickersgill*, 1 T. R. 660; 1 R. R. 348, remarks of Buller, J.; *Brecon Markets Co. v. Neath and Brecon Rail. Co.*, 42 L. J., C. P. 63, Exch.; *Richards v. Bennett*, 1 B. & C. 223; 25 R. R. 372; *Laurence v. Hitch*, 9 B. & S. 467; *Middleton v. Lambert*, 1 A. & E. 401; 40 R. R. 309; *Reg. v. Salisbury (Marquis)*, 3 N. & P. 476.

⁵ Gunning, pp. 3, 25; Thorpe, J., 22 Ass. 58; 2 Roll. Abr. tit. Toll (B), pl. 1; *Mayor of Nottingham v. Lambert*, Willes, 111; Woolrych, p. 299.

⁶ *Truman v. Walgham*, 2 Wils. 96.

⁷ *Mayor of Nottingham v. Lambert*, Willes, 111.

⁸ Fitz. tit. Toll, pl. 3.

public,¹ is sometimes due for the private ferry, bridge, &c., of another.²

The right to take tolls exist only by Act of Parliament,³ by express grant from the Crown, or by immemorial usage, which pre-supposes such a grant, and from which, if uncontradicted, a grant must be presumed. In no case can a claim for toll be supported unless some consideration can be shown on which to found the claim, an express grant from the Crown being void unless founded on sufficient consideration, the creation of a toll being only a mode of paying for a public service.⁴ When an Act authorizes the exaction of a toll, the accommodation for which the toll is authorized must be provided. Thus where the fishermen of a sea village had been immemorially accustomed to beach their boats in winter on ground adjoining the harbour, and where the proprietor had subsequently obtained a local Act authorizing his levy of five shillings yearly for each boat beached, the fishermen's rights were enforced against him, and it was held, that he could not exclude the fishermen from the ground used for beaching without assigning them other ground equally well-adapted for the purpose.⁵

Previous to the Prescription Act,⁶ "it was necessary to show "that the right prescribed for existed in the time of Richard I., "which was done either by positive proof of its existence at that "remote period, or by the evidence of modern usage from which "its existence at that time could be inferred."⁷

Prescription
and immemo-
riality.

Though, however, it is now regulated by that statute, the question of immemoriality may still arise.

" 'Prescription,' 'from time whereof the memory of man run-
" 'neth not to the contrary,' and 'time out of mind,' are all one
"in law,⁸ and this, says Lord Coke,⁹ is to be understood not only
"of the memory of anyone living, but also of proof of any record,
"writing or otherwise to the contrary."¹⁰

¹ *Pelham v. Pickersgill*, 1 T. R. 660 ; 1 R. R. 348.

² 1 Sid. 454.

³ When an Act of Parliament has confirmed a right to take toll which formerly existed by custom or prescription, such right becomes thenceforward a statutory right, and the lower right is merged in the higher Parliamentary title: *Taylor v. Windsor*, (1899) App. Cas. 44; 68 L. J., Q. B. 87; 79 L. T. 450.

⁴ *Jenkins v. Harvey*, 1 C. M. & R. 877; 40 R. R. 769; *Kingston-on-Hull Docks v. Lamarche*, 8 B. & C. 42; 32

R. R. 337; *Fulmouth v. George*, 5 Bing. 206; 30 R. R. 597; *Gann v. Free Fishers of Whitstable*, 11 H. L. 192; *Mayor of Nottingham v. Lambert*, Willes, 111; *Mayor of Exeter v. Warren*, 5 Q. B. 773; see *ante*, Chap. I. pp. 53 *et seq.*, and *post*, pp. 557 *et seq.*

⁵ *Aiton v. Stephen*, 1 App. Cas. 456; H. L., Sc. (1876).

⁶ 2 & 3 Will. IV. c. 71.

⁷ Gunning, pp. 27, 28.

⁸ Com. Dig. tit. Prescript (E).

⁹ Co. Litt. 115 a.

¹⁰ Gunning, p. 27.

Where rights are claimed by prescription, the jury ought to be directed that from modern usage they are warranted in presuming that the right claimed is immemorial, unless they are satisfied of the contrary by other evidence.¹

No objection can be made on the ground of rankness² to a toll the right to levy which depends upon a corresponding obligation to do something beneficial to the payers of the toll.

The long enjoyment of tolls lays a foundation for a good consideration in respect of them.³

"Where a record is produced to prove a custom, and there is 'no direct issue on the custom, the constant practice is,' said Lord Abinger, C. B.,⁴ 'to give some evidence to show that the 'custom was really in question, otherwise a verdict in *indebitatus assumpsit* would prove nothing."

"It is well known," said Best, C. J., "that many tolls are good 'under a custom of which a good grant could not be made at the 'present time. A custom which is proved to have existed immemorially will be good if it be of such a nature that it is possible 'it can have had a good beginning. Although it be such as to 'confer what the king cannot now grant, yet if it be not contrary 'to reason it may be supported; for it might have had its commencement from an Act of the legislature. Custom is a local 'law which supersedes the general law, and if the law gives us 'the maxim, '*Consuetudo ex certâ causâ rationabili privat communem legem*,' the custom on which the plaintiff rests his claim appears 'to us to be reasonable and convenient, even to those who resist 'its establishment; advantageous to the public by encouraging 'a valuable fishery; and highly beneficial as tending to the 'preservation of human life. . . .

"Wherever customs are set up, judgments in cases between 'parties are admissible to prove or disprove such customs.'"⁵

Where an undertaker improved the navigation of a river by making locks and cutting channels under ancient charters which gave him and his heirs and assigns the sole license and power of carrying goods in and through the river and all profits by carry-

¹ *Jenkins v. Harrey*, 1 Gale, Exch. 23; 40 R. R. 769. See *Goodman v. Saltash Corporation*, 7 App. Cas. 633, *ante*, pp. 337 *et seq.*

² *Ibid.*; 1 Gale, 454 (Exch.); 5 Tyr. 187.

³ Woolrych, p. 305; *Mayor of Exeter*

v. Warren, 5 Q. B. 773; *S. C.*, Dav. & M. 524; *Reg. v. Simpson*, (1901) 2 Ch. 671 (C. A.).

⁴ *Layburn v. Crisp*, 4 M. & W. 320, 325.

⁵ *Lord Falmouth v. George*, 5 Bingh. 286; 2 M. & P. 457; 30 R. R. 597.

ing such goods, but did not specifically grant to him a right to take tolls, and it was proved that a rate had been charged and paid for more than two centuries for the passage of boats laden with merchandise through each of the locks, it was held that the public were entitled to pass through the locks, but only on the payment of a reasonable toll for boats laden with merchandise.¹

A toll reasonable in amount, but varying from time to time according to the value of money, is valid in law.² The right to vary tolls.

Tolls on canals are now regulated by 36 & 37 *Vict. c. 48, s. 15*, the Regulation of Railways Act, 1873, and 51 & 52 *Vict. c. 25*, the Railway and Canal Traffic Act, 1888. See *ante*, p. 494.

Equality clauses are, however, expressly introduced into all modern Acts empowering companies to levy tolls, which provide that the tolls shall not exceed the maximum allowed by the Act.³

On this the case of *Hungerford Market Co. v. City Steamboat Co.* is important.⁴

By sect. 76 of 11 *Geo. IV. c. lxx.*, the Hungerford Market Company were empowered to take from the masters of steamboats in respect of passengers landing on or embarking from the wharf authorized to be erected by them such tolls within the maximum of 2*d.* for each passenger as should "at any time or from time to time be fixed and appointed by the company." By sect. 53 of 6 & 7 *Will. IV. c. cxxiii.*, for building a footbridge over the Thames from Hungerford Market, called "The Charing Cross bridge," reciting that it was contemplated that the northern pier of the bridge should be a landing-place for passengers embarking or disembarking at the pier, or from any float attached thereto, the company were empowered to take the same tolls as they were empowered to take at their wharf under their former Act. The bridge having been built, and the northern pier having been used as a landing-place, the plaintiffs resolved that the toll to be paid should be 2*d.*, subject to such "modifications as may have been agreed on, or may hereafter be agreed upon in any particular cases, between this company and the owners or proprietors of steamboats or vessels." By sect. 125 of 6 & 7 *Will. IV. c. cxxiii.*, the tolls to be taken by the Hungerford Bridge Company by virtue of that Act were to

¹ *Reg. v. Simpson*, (1901) 2 Ch. 671 (C. A.).

M. C. 86.

³ See *ante*, pp. 494 *et seq.*

² *Laurence v. Hitch*, 9 B. & S. 467; as to notice of varying of tolls, see *Gregson v. Potter*, 4 Ex. D. 142; 48 L. J.,

4 30 L. J., Q. B. 25; 3 L. T., N. S. 732.

be charged equally, and no reduction or advance in them was either directly or indirectly to be made in favour of any particular person or company:—Held, 1st. That there was no obligation on the plaintiffs to impose an equal toll on all persons or steamboat companies; and that sect. 76 of 11 *Geo. IV. c. lxx.* did not restrain them from making agreements with steamboat companies for a lower toll than that fixed and appointed; 2nd. That sect. 125 of 6 & 7 *Will. IV. c. cxxviii.* applied only to tolls taken by the bridge company, and not to the defendants.¹

Where certain justices convicted a person for taking a toll greater than by law he was allowed to do, and a rule was obtained to remove the case into the Court of King's Bench: held that a mere claim of a right to take certain tolls, without showing clearly that it is a *bona fide* claim, is not sufficient to oust the justices of their jurisdiction to convict for taking them improperly.²

Power to take tolls entails on bodies incorporated by statute the same liability as would exist in individuals.

The power to take tolls entails on bodies incorporated by statute the same liabilities as would exist in the case of individuals, and which liabilities form part of the consideration necessary to support a toll. "Where a body (such as the Mersey Docks and Harbour Board) is constituted by statute having the "right to levy tolls for their own profit, in consideration of their "making and maintaining a dock or canal, there is no doubt of "their liability to make good to the person using it any damage "occasioned by their neglect in not keeping the works in proper "repair."³ Therefore, such a corporation being empowered by Act of Parliament to make and maintain docks for the use of the public, and to take tolls from persons using them, was held liable to the owners of ships in actions for negligence, as long as the docks remained open for the public, and was held bound, whether they received the tolls for beneficial or fiduciary purposes, to take care that the docks were navigable without danger.⁴

Even where such bodies receive tolls for beneficial or fiduciary purposes.

Tolls, how extinguished.

Tolls granted by statute may be extinguished either by the act of God or by law.⁵

¹ See remarks of Cockburn, C. J., as to the power of the company to vary tolls and on Lord Ellenborough's judgment in *Lees v. Manchester and Ashton-under-Lyne Canal*, 11 East, 645; 11 R. R. 297, *post*, p. 592.

² *Rea v. Hampshire Justices*, 3 D. P. C. 47; 35 R. R. 407. See, too, as to the alteration and variability of tolls, *Lancum v. Lorrell*, 6 C. & P. 463; *Barton v. Benett*, 12 W. R. 709, Q. B.

³ Lord Cranworth, L. C., in *Mersey Dock Co. v. Gibbs*, 11 H. L. Cas. 686; 12 Jur., N. S. 571.

⁴ *Ibid.* (affirming the judgment of the Court of Exchequer Chamber, 8 Jur., N. S. 486); *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 213; *Mersey Dock and Harbour Board v. Cameron*, 11 Jur., N. S. 746. See *ante*, p. 273, and pp. 470 *et seq.*

⁵ *Brown v. Mayor of London*, 9 C. B.,

It would appear that in order to pass any interest by a *Lease of tolls* a deed is necessary. Thus where certain tolls traverse of a bridge were let, but not by deed, it was held that no interest passed, and that the owner of the bridge was therefore rateable in respect of his beneficial occupation.¹

*Swatman v. Ambler*² was an action of debt on an indenture bearing date 27th December, 1849, and made between five commissioners of an inland navigation, under the authority of several Acts of Parliament, of the one part, and the defendant of the other part, whereby the commissioners, in consideration of a certain rent, demised the tolls of the said navigation to the defendant for a year from the 1st of January, 1850, at the rent of 3,470*l.* together with certain other payments, and the defendant covenanted with them, and also with the whole body of the commissioners, as a separate covenant for the payment of the rent. Breach, non-payment of the rent. Plea that the commissioners never executed the lease, and that the entry and occupation was at the will of the commissioners only, and not under the demise. Replication that the defendants had entered, and had received and enjoyed the tolls, &c. by the permission of the commissioners, under the terms of the indenture. Held, that as the lessors had not executed the lease, the lessee had never received the consideration for which he had stipulated, namely, a permanent estate during the demise and under its terms, and therefore that he was not liable to be sued on his covenant on the lease.

A right of distress is incident to every toll,³ and the distress may be made on the thing itself in respect of which the toll is due, or on any portion of it, as on a ship or any part of it for a toll due on goods exported in the ship,⁴ or under sect. 17 of the St. Katherine's Dock Act on any goods of the same owner on the premises.⁵ A power of distress implies an antecedent right of action.⁶

Right of distress incident to tolls.

N. S. 726 ; 17 Jur., N. S. 755 ; affirmed on appeal, 13 C. B., N. S. 82.

¹ *Reg. v. Marquis of Salisbury*, 3 N. & P. 476 ; 8 A. & E. 716.

² 8 Exch. 72 ; 22 L. J., Exch. 81. See the judgment of Martin, B. ; and cf. *Pitman v. Woodbury*, 3 Exch. Rep. 4 ; 22 L. J., Exch. 83 ; and the judgment of Parke, B., therein.

³ *Gunning*, p. 216 ; Bac. Abr. tit. Distress, pl. 6 ; Vin. Abr. tit. Toll, I. ;

Heddy v. Wheelhouse, Cro. Eliz. 558 ; and *post*, p. 594.

⁴ *Gunning*, p. 216. *Vinkensterne v. Edden*, 1 Raym. 386 ; 1 Salk. 248 ; Carth. 357.

⁵ *Green v. St. Katherine's Dock Co.*, 19 L. J., Q. B. 53 ; 13 Jur. 116.

⁶ *G. E. Rly. Co. v. Harwich Corporation*, 41 L. T. 835 ; 44 J. P. 104, H. L. (E.).

Tolls incident
to rights of
water.

Having thus indicated some of the points which it was necessary to consider with regard to the general law of tolls, we will proceed to consider those incident to the rights of water, in the following order :¹

Customary } I. Tolls on the sea and navigable rivers, which
Tolls. } will be found to include port tolls.²

Statutory } II. Tolls for harbours, lighthouses, docks, and
Tolls. } piers.

III. Tolls on canals.

Tolls on the
sea and navig-
able rivers.

"The rights of water," says Woolrych,³ "are not in general liable to tolls. Indeed, it may be laid down as a principle, subject to certain qualifications which will be stated by and by, that public waters are exempt from any claim of this kind. They are the birthright of every man, and a duty cannot therefore be imposed in respect of such privileges." Hence no toll is demandable from vessels navigating the high seas, which have been called "the great highway of the world ;"⁴ and there can be no prescription to take toll on an ancient navigable river,⁵ which is in the nature of a highway, and where, if the water alters its course, the way alters also.⁶

But to this
there are two
exceptions.

This freedom from toll, however, is subject to two exceptions,⁷ both in the case of the sea and navigable rivers. As has been stated above, toll over a public highway is usually toll thorough, and a prescription for toll thorough⁸ cannot be supported in law unless a good consideration be shown for it, though toll traverse, where a consideration is implied, may.⁹ Hence the exceptions referred to occur, 1st, where benefits are done to the community at large, which form a good consideration for a toll ; and 2nd, where a toll is created by the legislature.¹⁰

1. Where
benefit is done
to the
community.

2. Where toll
is created by
legislature.

¹ While the first class of tolls are created only by grant, custom, or prescription, it will be found that the second and third are for the most part levied on the authority of Acts of Parliament. There are also certain species of tolls closely connected though not entirely identical with port tolls, which Lord Hale (see p. 571, *post*) terms shore tolls, which sometimes are originated by custom and sometimes by statute. The division, therefore, of *tolls customary*, *tolls partially statutable and partially customary*, and *tolls statutory*, might have been adopted. It would not, however, seem to be so convenient in a work treating specially on tolls incident to water, and it has, therefore, been deemed better to follow the method adopted by

Woolrych.

² For ferry tolls see *ante*, Chap. VIII.

³ Woolrych, *Law of Waters*, p. 298.

⁴ *Ibid.* p. 299.

⁵ *Mayor of Nottingham v. Lambert*, Willes, 111 ; cf. *Lord Chelmsford in Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 223.

⁶ Gunning, p. 19. *Com. Dig.* tit. *Chem. A. 1* ; citing *Thorpe, J.*, 22 *Ass.* 93 ; and cf. Gunning, p. 18 ; 10 *Mod.* 384 ; *Wilkes v. Kirby*, 1 *Lutw.* 490 ; 2 *Lutw.* 1519.

⁷ Woolrych, p. 299.

⁸ See *ante*, p. 546.

⁹ *Mayor of Nottingham v. Lambert*, Willes, 111.

¹⁰ Woolrych, p. 299.

With regard to navigable rivers, as well as to tolls generally, the case of *Mayor of Nottingham v. Lambert*,¹ which has already been alluded to, is of great importance.

Mayor of Nottingham v. Lambert.

It was a case on a special verdict, in which the plaintiffs declared that Nottingham has been time out of mind a town corporate, and called by several names according to the several charters set forth in the declaration. That the manor of Nottingham is an ancient manor, and that time out of mind till 15th of September, 28 *Hen. VI.*, it was parcel of the county of Nottingham, and from that time and still is within the county of the town of Nottingham.² That the river Trent in and throughout the said manor is, and time out of mind hath been, an ancient navigable river; and that the mayor and burgesses of Nottingham, and all their predecessors by their several names, have time out of mind had and received and used, and ought of right to have and receive, by their ministers and servants a certain duty or toll of every master or navigator of every boat, barge, or other vessel laden with goods, wares and merchandise navigated on the said river Trent through the manor aforesaid (the said master or navigator being a foreigner and not a burgess or freeman of the said town), viz. 2*d.* a ton for every ton of goods loaden and being upon any vessel so navigated as aforesaid.

Then they set forth that the defendant was a foreigner and not a burgess or freeman; that he became indebted to the plaintiffs, &c., and being so indebted promised to pay and hath not paid, &c. Likewise they further declare for a toll for passing through a certain bridge.

The jury found a special verdict on the first count (to which the defendant pleaded the general issue that he had made no such promise), affirming the matters alleged in the declaration, and also "that there was not any consideration proved to them at the trial for the payment of the said duty or toll," and concluded as usual, submitting the matters of law to the judgment of the Court.

Willes, C. J., who delivered the opinion of the Court, was of opinion that the toll claimed was a toll thorough, that a prescription for toll thorough in a navigable river cannot be supported in

¹ Willes, 111. The case was twice argued, first, on 1st June, 1738, and again on the 2nd November of the same year.

² Which was made a county of itself by the charter of 15th September, 28

Hen. VI., the last charter that of October 19th, 4 W. & M., incorporating the plaintiffs by the name of the Mayor and Burgesses of the town of Nottingham.

law unless a consideration be shown for it, and that, as in this case no consideration was proved, judgment must be given for the defendants. The plaintiffs did not claim as lords of the manor or owners of the soil of the river; but from the case of *Gann v. Free Fishers of Whitstable*,¹ cited hereafter, which decides the point with regard to tidal estuaries, it may be presumed that such a claim could not be supported even in non-tidal waters without consideration.

There can be no toll on a public river save where there is sufficient consideration, or a benefit to the public implying such consideration.

Commenting on this case, Woolrych² observes: "Hence it appears that there are two cases in which toll may be had upon a public river; 1st. Where a sufficient consideration appears, and 2nd. Where the nature of the benefit is such as to imply a consideration." As an example of the first named instance, he cites an action for toll³ brought by the mayor and burgesses of Gloucester in respect of every boat passing up the river—when the claim was allowed; and for the second case he adduces as an authority *Roy v. The Corporation of Boston*,⁴ where *quo warranto* was brought against the corporation for demanding toll thorough, and they justified the demand by reason of a consideration for repairing a bridge and a pavement, and also a sea bank, when the Court held, that although toll thorough could be claimed as such without more, yet as here it was founded upon a consideration, it should be deemed good.⁵

¹ 11 H. L. Cas. 192. See *ante*, p. 55, and *post*, p. 566.

² P. 303.

³ Ibid. 21 Hen. VII. c. 16.

⁴ Ibid. Cro. Eliz. 11, by Popham, C. J. Sir W. Jones, 162.

⁵ Cf. *Haspurt v. Wills* (1 Mod. 47; S. C. 1 Vent. 71; S. C. 8th ed. 454, nom. *Heshod v. Wills*; S. C. 2 Keb. 624, 665; and see Woolrych, pp. 301, 302; and Gunning, pp. 624, 665); and *Colton v. Smith* (1 Cowp. 47; and see Woolrych, p. 301; and Gunning, pp. 7, 31, 33). The first was a special action upon the customs of wharfrage and craneage in the city of Norwich. The declaration stated that there was a common wharf with a crane to it, and that there was a custom for all goods brought down the river and passing by to pay a duty. It was objected that this claim of toll was bad, being for toll thorough. "If," said Mr. Justice Twisden, "they, the citizens, had unladed at the quay, they should have paid the whole duty, or even had they done so at some other

"place within the city, there might have been some reason for the charge, or had they cleansed the river." The learned judge added, "that there had been a toll claimed at Gravesend for boats lying in the river Thames, which had been adjudged ill by Parliament."

The second-named case was an action for tolls for landing goods on a wharf at Gainsborough. Declaration stated that the plaintiff was lord of the manor of Gainsborough, and that he and all those, &c. had used to keep and repair a wharf within the manor, and that in consideration thereof they had been used to receive toll for all goods landed within the manor, not confining it to the wharf, which alone the declaration stated the plaintiff to have maintained. The plaintiff having recovered, the defendant afterwards moved in arrest of judgment, on the ground that the prescription laid was too large for the consideration alleged; but the Court thought otherwise, Lord Mansfield, C. J., observing "that everybody that paid

All the principal navigable rivers of the kingdom are now under the control of conservators incorporated by particular statutes, which regulate the amount and mode of levying tolls thereon. Such tolls, being statutory tolls, will fall within the rules to be noticed hereafter.¹

With regard to the sea, the rule laid down as to navigable rivers will be found to hold good, and toll may be lawfully demanded where private exertions have succeeded in forming a port, harbour, or quay, so as to be beneficial to the public;² or where accommodation is made on the land of any party demanding therefor a toll.³

Of common right the subjects of the king have the liberty of using the ancient ports of the realm, and they are as free to all as the king's highway; and those who seek to restrain them of this free liberty, ought to show a meritorious consideration—a *quid pro quo*.⁴

"If a man," said Lord Hale, C. J., in *Warren v. Prideaux*,⁵ "will prescribe for a toll on the sea, he must allege a good consideration, because by Magna Charta and other statutes, every one hath a liberty to go and come upon the sea without impediment. If defendant had said that he had a port, and was bound to maintain that port, that might have been a good prescription. But in this case there must be a special inducement, and compensation to the subject, by reason of those statutes by which all merchants and others have liberty to come and go out." There a prescription for toll was claimed in consideration of maintaining a certain quay, and a bushel of salt had been immemorially taken from every ship which came laden with salt into Slipper Point. The ship in question came within Slipper Point, and was distrained for toll. It was contended that the avowry could not be supported for want of a meritorious consideration, and although the Court were of that opinion, and so against the prescription, yet they

Tolls on the sea only demandable where such consideration as a port can be shown.

Ancient ports of the realm free of toll to all subjects of the realm.

"had a benefit of it, and if they landed their goods elsewhere within the manor, they landed them on the private property of the plaintiff, and originally, indeed, the lord was the owner of all the lands in the manor, and the prescription was good according to many cases."

¹ See *post*, pp. 574 *et seq.*

² Woolrych, p. 299.

³ *Ibid.* In the second case the toll will be traverse, in the first usually thorough.

⁴ Gunning, p. 3, &c., &c.

⁵ See Gunning, p. 20 (1 Mod. 104; S. C. 3 Keb. 249, 275; S. C. Sir T. Raym. 232; S. C. 2 Lev. 96, reported as *Prideaux v. Warne*, S. C. Freem. 355, under the same name).

distinctly held, that if the prescription had been for a port, it would have been good.¹

In *The Mayor of Yarmouth v. Eaton*,² Lord Mansfield, C. J., said: "The plaintiffs set out that they have a right by prescription to the port duties of Yarmouth; and the question is, whether they are obliged to set out a consideration. The only cases like the present are port duties, the rest are out of the question. The making a port is itself a consideration—it is a self-evident convenience to the merchants; it speaks for itself; it may never require repair—therefore I do not know that it is necessary to show repair. The ownership of the soil is out of the case." The plaintiffs, therefore, had judgment.³

The law relating to the erection and creation of ports has already been discussed in a previous chapter,⁴ and it will, therefore, only be necessary to recapitulate some few points respecting it which are necessary to the explanation of the present subject.

The erection of ports is a royal prerogative.

It is part of the royal prerogative to erect public ports in the kingdom;⁵ and the Crown has therefore a special interest in the franchise of a common port, and consequently no subject can erect one without a charter or lawful prescription, either for all comers or for the men of a particular fee or precinct, as for his own tenants.⁶

Every public port is a franchise.

Lord Hale states⁷ that "Every public port is a franchise or liberty, as a market or fair, and much more,—for first, It is a place of common resort of merchants and shipping; 2nd, Every port had of necessity a market belonging to it, as well for the vent of merchandises that were imported or to be exported, as for the vent of victuals and provisions for the supply of mariners and victualling of ships; and 3rdly, To every public port there were certain *common tolls* incident, as for wharfage and land leave, and the like, which by law cannot be taken without a lawful title by charter or prescription."

Title thereto involves the question of 1, interest in soil,

The question of the title to a port involves, according to Lord Hale,⁸ two considerations,—1st, That of the *interest* of the soil

¹ See Woolrych, p. 300.

² See Woolrych, p. 301; 3 Burr. 1402; and see Gunning, pp. 23, 24; and see *ante*, p. 548, n. 2.

³ *Topwell v. Ferrers*, Hob. 175; *Mayor of London v. Hunt*, 3 Lev. 37; *Exeter, Mayor of, v. Trimlett*, Trin. 32 Geo. II. were referred to for the plaintiff.

⁴ See *ante*, Chap. I. pp. 50 *et seq.*

⁵ *Ball v. Herbert*, 3 T. R. 261; 1 R. R. 695.

⁶ Gunning, p. 114. Hale, de P. M., part 2, ch. 2., p. 51.

⁷ De Portibus Maris, part 2, chap. 2, p. 50.

⁸ De Port. Maris, part 2, chap. 2, pp. 71, 72.

“both of the shore and town, which is the *caput portus*, and
 “also of the haven itself, ‘wherein ships ride or apply’; and
 “2nd, That of the *interest of franchise*, or the liberty itself,—
 “that civil signature which doth give the liberty of public
 “arivage, which is in truth the *formale constituens* of a port in
 “a legal signification.”

and 2,
interest of
franchise.

Both of these interests “may be acquired by prescription;
 “and upon this title a port may as well belong to a subject
 “as to the Crown, as well in point of property in the soil as in
 “point of franchise, of which several instances are given by
 “Lord Hale, *inter alia* Liverpool, Milford, Poole, Topsham, and
 “others.”¹

There are two kinds of ownership of a port which the Crown
primâ facie has, but which a subject may have, and these are,—
 1st, The ownership of property; and 2nd, The ownership of
 franchise,—both of which usually concur in the same person,
 though they may be divided.²

The first occurs where the Crown, or a subject by charter or
 prescription, is owner of the soil of a creek or haven where
 ships arrive and come to shore, and may belong to a subject,
 though he has not thereby the franchise of a port, neither can
 he so use and employ it unless he has that liberty by charter
 or prescription. He may bring his own boats thither to import
 and export his own goods that are not customal; but he cannot
 use it as a public port, or admit foreigners, or take toll or
 anchorage.³

The second species of ownership gives the formality or denomi-
 nation of a public or lawful port for ships to lade or unlade
 their merchandise at; and this, as has been said, may be
 acquired by charter or prescription. And although the soil of
 a creek or harbour may belong to A., the Crown may grant
 there the liberty of the port to B.; but if A. have bank of the
 port, the Crown cannot grant to anyone a liberty to unlade his
 goods upon the bank without A.’s consent, although such liberty
 may by custom be free to all.³

“From this *jus dominii* of property or franchise, or of both,
 “there arise several *port duties*, sometimes called *portatica*,
 “sometimes *tolls*, sometimes *customs*,—some of which are

Port dues
arise from the
jus dominii of
property or
franchise.

¹ Gunning, pp. 115, 116, 117.

² See Gunning, pp. 116, 117; Hale, de

Port. Maris, part 2, ch. 6, p. 72.

³ Gunning, p. 117.

"incident to the ownership of the port, while others are due only by special usage or prescription."¹

The *dues incident to the ownership of a port* are—

Anchorage.

1. *Anchorage*¹—A toll for anchoring a vessel in the port, which properly and *primâ facie* arises from or in respect of the soil, of which it is evidence, but sometimes it is due to the owner of the franchise merely.

Ballastage.

2. *Ballastage*² of ships—A toll for the liberty of taking up ballast from the bottom of the port, and arising out of the property in the soil. In the Thames this liberty is granted by the Crown to the Corporation of the Trinity House, and the amount per ton which the corporation may charge the masters of vessels for ballastage is restricted by statute.

Duties due to owner of a port by custom.

The *duties due to the owner of a port by custom or prescription* are various, and differ in various ports, but the following may be enumerated:³—

Busselage.

1. *Busselage*,⁴ which Lord Hale mentions as claimed at Hull, and one of the profits which were answered for "to the King and Dukes of Cornwall in the Port of Plymouth."

Keelage, &c.

2. *Keelage*—"For every vessel coming within the port a certain toll."⁵

Besides these, may be mentioned *petty customs*,⁶ *average*, *primage*,⁷ *petty loading*, *lastage*, *prisage*,—all of which may lawfully be taken by prescription in a port.⁸

These duties were sometimes called *tolls*, sometimes *consuetudines*, from which, when in the king's hands, he might grant a discharge by charter, but which, when they were already in a subject or corporation, either by grant or prescription, he had no power to exempt anyone from payment of. They would pass

¹ Cf. *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192; and *Free Fishers of Whitstable v. Foreman*, L. R., 2 C. P. 688; *Foreman v. Free Fishers of Whitstable*, L. R., 3 C. P. 586; L. R., 4 H. L. 266, both of which see *ante*, pp. 55 *et seq.*, and *post*, pp. 566 *et seq.*

But little is said of anchorage in the books, and it is not mentioned in Comyn or Viner or Bacon. Lord Hale mentions Plymouth as an instance where the shore of the harbour belongs to one, and the anchorage to the lord of the port in point of franchise. Gunning, p. 117.

² Cf. *Trinity House v. Staples*, 2 Chit. p. 689.

³ Gunning, p. 117.

⁴ Cf. *Serjeant v. Reed*, 2 Str. 1228;

S. C. 1 Wils. 91; Woolrych, 301.

⁵ *Ibid.* Hale, de Port. Maris, part 2, ch. 6, p. 72; and see part 3, ch. 4, p. 132.

⁶ "In the king's grant of the fee farm of the port and city of Exeter are mentioned certain duties called '*petty customs*, which are small rates paid in respect of goods imported—*e.g.*, 'those prizes and customs belonging to the king in his port of Newcastle, which are set forth in record, 20 Ed. I.'" Hale, de Port. Maris, part 3, ch. 4, p. 132; see Gunning, p. 117.

⁷ Cf. *Bradley v. Newcastle-on-Tyne*, 2 El. & Bl. 427, which see *post*, p. 569.

⁸ Hale, de Port. Maris, part 2, ch. 6, p. 74.

under the words "*Omnes consuetudines*" or "*tolneta portūs de A.*"¹

Lord Chelmsford, in his judgment in *Gann v. The Free Fishers of Whitstable*,² commenting on Hale's³ account of the port duties above mentioned, said: "It appears to me that the correct interpretation of his language is, that without the king's grant or charter a subject cannot have the franchise of a port, and without having a port he cannot take toll or anchorage, which are dues arising from and incident to it."

A port may be created in modern times with a right to receive a port duty from all who come within its limits. A port duty *ex vi termini* implies a consideration for it.⁴

Ports may be created in modern times—port duties.

"There is no doubt a port duty may be created within time of memory. The Crown may grant to the subject the right to create a port, and may grant to the owner of the port, the person under an obligation to repair, the right of receiving a consideration for all who use it,—a right to receive so much for every quantity of coals or other commodity imported into the port. The subject receives for that duty an equivalent in repairs of the port, and the advantage he derives from it."⁵

Where, however, a party⁶ suing for port duties as owner of a port, gave no other evidence of title than the continual payment of a certain duty, which the jury found unreasonable in amount; it was held that he could not have a verdict for a less amount found by the jury to be reasonable. Lord Denman, C. J., said, *inter alia*, "We think the jury could not properly be told that they might presume a grant where the plaintiff refused to produce it, especially a grant of a toll of unreasonable amount. This would be pressing the doctrine in *Jenkins v. Harvey*⁷ too far. The doctrine held in that case is not indeed altogether satisfactory, and any person affected by it ought to have an opportunity of tendering a bill of exceptions.

¹ Hale, de Port. Maris, part 3, ch. 4, p. 132.

"The fullest account of this kind of 'dues is in an old book called 'Consuetudines et usus Sandaici,' mentioned by Lord Hale (part 3, ch. 2, p. 118; ch. 4, p. 133), and there is a long enumeration of them in *Mayor of Waterford's case*, (Davy's Rep. 6);" Gunning, p. 117.

² 11 H. L. Cas. pp. 219, 220.

³ De Port. Maris, ch. 2, p. 46; ch. 6, pp. 73, 74.

⁴ *Jenkins v. Harvey*, 1 Gale, 23; 40 R. R. 769.

⁵ Ibid. per Parke, B., 1 Gale, p. 27.

⁶ *Brune v. Thomson*, 4 Q. B. 543. Semble, that where the duty is claimed under a grant from the Crown, which appears on the evidence to be enrolled of record, but is not produced by the plaintiff, the jury ought not to be directed to presume such grant upon mere evidence of usage.

⁷ 1 Gale, 23; 1 C., M. & R. 849; 40 R. R. 769.

“ We also think it open to question whether the Crown can grant
 “ a right of taking toll indefinitely throughout a port beyond the
 “ limits of the grantee’s land, and where the grantee may not
 “ even have it in his power to do repairs. The question, too, as
 “ to the legality of applying ancient port duties to new objects
 “ of commerce raised in the *Liverpool case*, but not decided, is
 “ proper to be considered.”

The decisions on the subject of ports turn chiefly on the validity of the custom or prescription in virtue of which toll is claimed.

Customs by
 virtue of
 which toll is
 claimed must
 be well sup-
 ported.

In *Vinkensterne v. Ebdon*¹ a custom was alleged that the mayor and burgesses of Newcastle had been accustomed from time immemorial to repair the port of their town, and that they had used to have a toll of 2*d.* per chaldron for all coals exported. The Court considered this a very reasonable custom ; for without ports there would be no navigation, and without a duty the port would not be repaired.

In assumpsit for weighage of goods brought into the port of London, it was objected that there was no consideration for the duty ; but as the defendant had the liberty of bringing his goods into port, which is a place of safety, it was resolved that the consideration was implied.²

In *Lord Falmouth v. George*,³ it was held that keeping up a capstan and rope in a cove to assist boats in landing, and without which they could not safely land in bad weather, was a good consideration for a reasonable toll on all boats frequenting the cove, whether they used the capstan or not ; and the custom to exact the toll was also held good, although the party claiming it was neither owner of the cove nor lord of the manor, nor were his predecessors shown to have been such ; but he and they had always been owners of the spot on which the capstan stood, and of an estate in the neighbourhood.

A fisherman frequenting the cove was, however, held not to be a competent witness for a party resisting the toll.⁴

In that case the plaintiff sought under a custom to establish a claim to the second best fish out of every boat load of fish landed in Senan Cove in Cornwall. A verdict having been found in his favour, a *rule nisi* was obtained by Bosanquet, serjeant, to set it

¹ 1 *Ld. Raym.* 384 ; *S. C.*, 1 *Salk.* 248.
 See, too, *Gunning*, pp. 28, 62, 119, 216 ;
Woolrych, p. 300.

² *Mayor of London v. Hunt*, 3 *Lev.*

37 ; *Gunning*, pp. 29, 33, 118 ; *Woolrych*,
 p. 30.

³ 5 *Bing.* 286 ; 30 *R. R.* 597.

⁴ 5 *Bing.* 286.

aside, but the case having been argued before Best, C. J., the rule for a new trial was discharged, the Court saying:¹—"It has been objected that there was no consideration for the custom for taking toll from the owners of boats who did not make use of the capstan to draw up their boats from the sea. Although it is not always necessary to use the capstan, yet if boats in certain seasons could not safely approach this place unless they were certain of having the assistance of the rope of the capstan to draw them out of the surf of the sea, we think that the keeping of the capstan and rope ready for the use of fishermen who resort to this cove is a sufficient consideration for a toll to be paid by them, whether they actually use it or not. . . .

"There is no doubt that the King may at this time establish a reasonable toll for the performance of any duty that the public convenience or safety requires should be performed. The creation of a toll is only a mode of paying for a public service. The power of creating tolls depends upon the necessity of the service and the reasonableness of the toll taken for it. If the service be not of public advantage, or the toll be unreasonable, it cannot be supported. But it is impossible to contend that this capstan and rope is not of the greatest importance to these fishermen. And it was not suggested either at the trial or in the argument here that the toll demanded was excessive or unreasonable. If the plaintiff had purchased this land a year ago and had made a landing-place in this cove, had built a capstan, provided a proper rope, and undertaken to keep the capstan and rope in a proper state at all times for the use of the fishermen, it would have been a sufficient consideration for the grant of such a toll by the Crown, as the jury have found was due to the plaintiff by virtue of a custom. . . . We have therefore no doubt that this is a valid custom. In the case of *The Earl of Falmouth v. Penrose*² the validity of the custom was never disputed; the objection then taken was that the pleadings were not applicable to the case proved."

A claim of anchorage dues cannot exist merely in respect of the use of the soil; it must be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered

Claim for anchorage dues cannot be made merely in respect of the use of the soil.

¹ 5 Bing. 291, 292.

² 6 B. & C. 385.

by the owner of the soil who claimed the anchorage dues.¹ A liability to make compensation for actual injury done to certain oyster beds by anchoring, is therefore not to be confounded with a liability to toll for casting anchor in the soil itself.²

*Gann v.
Free Fishers
of Whitstable.*

Lord Chelmsford, in his judgment in *Gann v. Free Fishers of Whitstable*,³ said: "My Lords, the principal question intended to be raised between the parties in this appeal is, Whether the respondents, the Company of Free Fishers and Dredgers of Whitstable, who are owners of a fishery for the growth and improvement of oysters within the limits of the manor of Whitstable, are entitled to demand from the appellant a payment for anchoring his vessel within the manor; their title to demand such payment being derived from the lord of the manor, whose predecessors have from time immemorial received a customary payment, 'for and on account of the anchorage of any ship or vessel within the said manor.' . . . In considering the question it is necessary to bear in mind that it applies exclusively to the claim of a toll or due for anchoring on the high seas, and not in any port or haven. . . . I have therefore arrived at the conclusion that the undoubted right of the public freely to navigate the highway of the sea cannot be restricted by the imposition of any payment whatever unless some good consideration can be shown for it; and the respondents have failed to establish any other ground of title in the lord of the manor to the anchorage due than the mere use of their soil. I consider this to be wholly insufficient to justify the demand in question, unless it can be held that the right of navigation does not include the right of anchoring, which can hardly be seriously contended.

"I admit that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it presumably capable of a lawful origin; but not being able to discover any ground upon which this claim of an anchorage due could have had a legal commencement, the case of *The Mayor of Nottingham v. Lambert*⁴

¹ *Gann v. Free Fishers of Whitstable*, 11 H. L. Cas. 192; 35 L. J., C. P. 29; 20 C. B., N. S. 1; 13 W. R. 589; and see *ante*, Chap. I. pp. 55 *et seq.*; *Free Fishers of Whitstable v. Foreman*, L. R., 2 C. P. 688; 36 L. J., C. P. 173; *Foreman v. Free*

Fishers of Whitstable L. R., 3 C. P. 586; L. R., 4 H. L. 266.

² *Ibid.* Cf. *Mayor of Colchester v. Brooks*, 7 Q. B. 339.

³ 11 H. L. Cas. 215, 222, 223.

⁴ Willes, 111.

“is an authority for showing that no length of prescription can give it validity.”

If, however, a claim for anchorage dues on a navigable arm of the sea be presumably capable of a legal origin, and the payment of dues is shown to have been uninterruptedly received time out of mind, every intendment will be made in its favour.¹

But in case of a navigable arm of the sea, if claim be presumably capable of a legal origin, every intendment will be made in its favour.

Free Fishers of Whitstable v. Foreman.

In *The Free Fishers of Whitstable v. Foreman*,¹ an oyster fishery had been possessed, and an anchorage due had been claimed and received from time immemorial by the lords of the manor of Whitstable, in respect of all vessels casting anchor within the limits of certain anchorage ground within the manor. In 1795, the fishery and soil thereof (including the anchorage ground) were conveyed by the lord, with all its rights and appurtenances, to the plaintiffs, who thenceforth claimed and received the anchorage due. There was some evidence that Whitstable was a limb of the port of Sandwich; but there was no direct evidence to show that the anchorage ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. There was, however, evidence that the lord of the manor was the owner of a landing-place called Le Craston, within the limits of the manor, and that he took toll upon merchandise landed there, and also that he was the owner of the anchorage ground, and took the anchorage due as such lord and owner of the soil. The recitals in the Act of Parliament, by which the plaintiffs were incorporated and empowered to purchase the manor and manorial rights, stated that there were “customary payments, usually and of right, made to the “lord of the manor for or in respect of any ship or vessel on the “landing of goods or merchandise within the said manor.” There was also evidence that the plaintiffs had, as far back as living memory extended, maintained buoys and beacons, which served the double purpose of pointing out the channel by which vessels of small burthen might safely reach the anchorage ground, and also of protecting the oyster beds:—Held, that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the anchorage ground, and the benefit to the public therefrom, afforded a sufficient consideration to support the plaintiff’s claim to the anchorage due.

¹ *Free Fishers of Whitstable v. Foreman*, L. R., 2 C. P. 688; 36 L. J., C. P. 173; *Foreman v. Free Fishers of Whitstable*, L. R., 3 C. P. 586; L. R., 4 H. L. 266.

Bovill, C. J., in delivering the judgment of the Court of Common Pleas,¹ contrasted this case with that of *Gann v. The Free Fishers of Whitstable*, noticed above.

“The right claimed by the plaintiffs in this case is similar to that which was questioned in the case of *The Free Fishers of Whitstable v. Gann*, viz., the right to an anchorage due from all vessels casting anchor on certain land covered by the sea, called the anchorage ground, near Whitstable, in the county of Kent. In the former case the right was sought to be maintained by reason of the plaintiff's ownership of the soil, upon which the anchors were cast. . . . The plaintiff's case being on that occasion based upon the ownership of the soil, their evidence had been directed to that point alone. No facts appeared from which the claim could be supported upon any other grounds, and the ultimate decision upon the then statements of their case were adverse to the plaintiffs. The present case is brought before us now in a different form. The claim is not now based upon the mere ownership of the soil of the anchorage ground; and we are called upon to decide whether, under the circumstances set forth in this special case, the plaintiffs have established their right to the payment in question.

“The view which we take of this case is entirely in accordance with the decision of the House of Lords, which was that the claim could not in point of law be supported in respect of the ownership of the soil alone.” (His Lordship then quoted the judgment of Lord Westbury, L. C.),² and continues:

“In the former case no consideration whatever was attempted to be shown for the payment, no facts were proved from which it could be inferred. . . . Upon the statements in the case now before the Court, it seems to us that the defects which existed in the former case have been supplied. The buoys and beacons have been maintained as far back as living memory extends; and we think we ought to presume that they have existed and been maintained from time immemorial; and when we find that the anchorage due has been received without interruption during the same period, and, therefore, ought to be referred to a legal origin, if it can be done; we consider that the maintenance of these buoys and beacons may

¹ Bovill, C. J., Willes, J., Keating, J., 688.
and Montague Smith, J., L. R., 2 C. P.

² 11 H. L. 208; 20 C. B., N. S. 14.

“be treated as the consideration for the payment that has been
 “so immemorially made; and as there would be a benefit to
 “navigation by pointing out the anchorage ground, and on a safe
 “channel or entrance to it, under the circumstances before
 “mentioned, we think there would, in point of law, be a sufficient
 “consideration to support the claim.

“Even if these buoys and beacons were maintained wholly
 “and solely for the purpose of preventing vessels grounding
 “upon the oyster beds, it is not certain that this also might not
 “be sufficient consideration upon the principle stated by Lord
 “Wensleydale in his judgment.¹ Our judgment is, however,
 “founded upon the ground which we have already stated, viz.,
 “the maintenance of the buoys and beacons for the purposes and
 “under the circumstances before mentioned, in connection with
 “the plaintiff’s ownership of the soil and the uninterrupted
 “enjoyment of the anchorage due from time immemorial.”

This case was affirmed on appeal by the Court of Exchequer Chamber² and the House of Lords,³ on the ground that the evidence showed the former existence of a port in the *locus in quo* from the immemorial payment of the tolls for merchandise and anchorage; for as anchorage dues were almost, if not universally, incident to a port, and as every intendment should be made in favour of a payment uninterruptedly made time out of mind, they were justified in drawing the inference that a port did exist, and therefore that the tolls had a legal origin.

In *Bradley v. Newcastle-on-Tyne*,⁴ a charter of 3 Jac. II. Primage.
 granted to the corporation of the master pilots and seamen of Newcastle-on-Tyne primage (described in the charter as an ancient duty) upon goods brought by ship into the Tyne or any of the creeks of the port of Newcastle, of which Sunderland was one, to be rated and accounted in manner and form following, that is to say: aliens and strangers born, and all other persons arriving with ships in the Tyne or within any of the creeks, members of the port of Newcastle, and not belonging to the same, to pay before they departed with their ships; and every free merchant and inhabitant of Newcastle arriving in the Tyne with a ship, within ten days after landing the goods. The charter also granted to the corporation all other perquisites, ancient duties and profits, which they had theretofore lawfully

¹ 11 H. L. 216; 20 C. B. N. S. 29.

² 13 L. T. N. S. 734.

³ L. R., 4 H. L. 266.

⁴ 2 El. & Bl. 427; 18 Jur. 246.

had and enjoyed; and also provided, that the sums granted by the charter should be in lieu of all other duties theretofore received; it was held that the charter was not inconsistent with the claim of primage in respect of goods imported into Sunderland by merchants resident there, and also that evidence of usage was admissible in support of the claim.

Ancient charters, if ambiguous, are to be explained by the usage under them; and the jury in that case may interpret the charter by the usage. As in the instance of the above-named charter of 3 *Jac. II.*, upon the issue of which a question was raised in 1851; when in the case of *Newcastle Pilots, &c. v. Bradley & Potts*, it was disputed whether the charter permitted primage to be taken of all ships entering Sunderland (a creek of Newcastle-upon-Tyne), or exempted ships belonging to merchants of Sunderland.¹ In delivering judgment, making the rule for a new trial absolute, Coleridge, J., said: "The rule has never been laid down in this matter more strongly than in *Jenkins v. Harvey*.² It has been questioned whether it was not there laid down too strongly; ³ but adopting the language used there it went no farther than this: that 'from uninterrupted modern usage,' a jury 'should find the immemorial existence of the payment unless some evidence is given to the contrary.'"

The same charter of *Jac. II.* granted to the master pilots and seamen of Newcastle-upon-Tyne, certain dues to be "paid by all persons being owners of any goods which should be brought in any ship from beyond the seas into the river Tyne," in manner following: "that is to say, aliens and strangers born, and other such persons who, with their ships should arrive within the said port and not belong to the same, before they depart with their said ships from the said port, should pay the duties aforesaid, and every free merchant and other inhabitant of Newcastle, arriving with their said ships within the river Tyne, should pay the duties aforesaid within ten days after the landing of the goods as aforesaid, upon lawful demand." The duties had always been paid by the importer:—Held, that a person who gratuitously landed, entered, and warehoused goods for the owners, who resided in London, was an "owner" within the meaning of the charter, and liable to the dues.⁴

¹ 2 EL. & BL. 428, note (a).

² 1 C. M. & R. 877; 1 Gale, 23; 40 R. R. 769.

³ *Brine v. Thompson*, 4 Q. B. 543, 552.

⁴ *Master Pilots and Seamen of Newcastle-upon-Tyne v. Hammond*, 4 Exch. 285.

The varieties of tolls hitherto noticed have been purely founded on custom; it will now be necessary to consider briefly certain duties closely connected with ports, though not identical with them, which are sometimes regulated by custom and sometimes by statute. These dues, which are termed by Lord Hale *shore duties*, arise by reason of interest in the soil of the shore of a port, and vary in different places both in kind and amount. It is rare, he observes, to find any port where the owner of the franchise has not a convenient portion of the shore and land adjoining where wharves and quays and warehouses may be built for the lading and unlading and safe custody of merchandises; but the interests may be and sometimes are divided, and the duties arising by reason of the goods when unladen and laid on shore are different from those already spoken of. And it often happens that a particular place within a port may be of great convenience to make a common quay or wharf, when the property in the soil may belong to a subject, who is not the owner of the port, when either his interest must be bought in by the owner of the port, or he must have the benefits which arise by the taking or landing the merchandise there.¹

Shore duties which depend sometimes on custom and sometimes on statute.

Of these duties the most important are *wharfage* and *craneage*.

Wharfage and craneage.

Wharfage is a toll or duty for the pitching or lodging of goods upon a wharf,² or "money paid for landing goods on a wharf or "quay, or for shipping or taking goods into a boat from "thence."³

"A duty for wharfage and craneage," said Lord Mansfield in *Stephen v. Coster*,⁴ "can not be due where the party has not had "the use of the wharf or crane. Wharfage is due for *landing on "the wharf*, and craneage for *the assistance of the crane*. Anchor-age or moorage are very different things."

The owner of a wharf or quay is entitled at common law to remuneration for the use of them,⁵ and in *Serjeant v. Read*,⁶ the claim for wharfage was compared to that for stallage, the party bringing his goods to the wharf or quay having an easement, and the owner of the wharf or quay a damage.

Owner of a wharf entitled at common law to remuneration.

With regard to amounts payable for wharfage duty, in many ports they are fixed by prescription, or by the grant under which

Amount may be fixed by prescription or grant.

¹ Hale de Portibus Maris, part 2, ch. 6, p. 76; see Gunning, pp. 122, 123.

² Gunning, p. 123.

³ Ibid.; Cunningham's Law Dict. tit.

Wharfage.

⁴ 3 Burr. 1409; 1 W. Bl. 413, 423.

⁵ Gunning, p. 123.

⁶ 1 Wils. 91; 2 Stra. 1228; Woolrych, p. 301.

the owner takes them ; or settled by statute,¹ and in both of these cases the amount so fixed cannot be exceeded, for it is part of that *jus publicum* which is vested in the community to have their access to ports as freely as formerly was used.² A. may also for his own private advantage in a port or town set up a wharf or crane, and take whatever rates he and his can agree for wharfage, craneage, &c. ; for he does not more than what is lawful for every man to do—viz. make the most of his own ; and such are the coal, wood, and timber wharves in the port of London, and some other ports.³ In such a case, however, where private property, by consent of the owners, becomes invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public in the exercise of that public interest or privilege conferred for their benefit.³ Lord Ellenborough, C. J., in *Allnutt v. Inglis*,⁴ when speaking on this point, quoted Lord Hale. “According to him,” said his Lordship, “wherever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port—as where he is the owner of the one wharf authorized to receive goods which happens to be built in a port newly erected—he is confined to take reasonable compensation only for the use of the wharf. Lord Hale puts the case either way : where the king or a subject have a public wharf to which all persons must come who come to that port to unlade their goods, either ‘because they are the wharves only *licensed* by the queen,’⁵ or ‘because there is *no other wharf* in that port as it may fall out, ‘in that case’ (he says) ‘there cannot be taken arbitrary and excessive duties for craneage, wharfage, &c. ; neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king’s licence or charter.’ And then he assigns this reason, ‘for now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only.’”

In the above case the London Dock Company having built warehouses in which wines were deposited, upon payment of such rent as they and the owners agreed upon, afterwards

¹ *E. g.* the duties in Hull are fixed by 27 Hen. VIII. c. 3, and 33 Hen. VIII. c. 33 ; see Gunning, p. 123.

² Hale, pp. 77, 78.

³ *Allnutt v. Inglis*, 12 East, 527 ; 11 R. R. 482.

⁴ 12 East, 527 ; 11 R. R. 482.

⁵ As to the prerogative of the Crown to ascertain the limits of ports and assign quays for the exclusive landing of merchandise, see *anté*, Chap. I. p. 51.

accepted a certificate from the Board of the Treasury under the General Warehousing Act of 43 *Geo. III. c. 132*, whereby it became lawful for the importers to lodge and secure the wines there without paying the duties for them in the first instance. It did not appear that there was any other place in the port of London where the importers had a right to bond their wines (though if the exclusive privilege had been extended to a few others, it does not appear that that would have varied the case); and it was held that such a monopoly, and public interest attaching upon their property, they were bound in law to receive the goods into their warehouses at a reasonable hire and reward.

Wharfingers in London are entitled¹ to wharfage for goods unladed into lighters out of barges fastened to their wharves;² and it appears that a custom exists in the same city of mooring barges for a tide at low water to the piles in front of the wharves erected along the river; but the custom does not extend to allow them to be moored to the wharf itself, except through distress.³

The amount to which a party claims to be entitled for wharfage by prescription ought in a plea to be set forth with sufficient certainty.⁴

Amount claimed must be set forth with certainty.

To an action of trespass for seizing the plaintiff's barley, defendant pleaded that one R. D. was seised in fee of the manor of Penzance, in which there was a quay or pier, part of the manor; and that he and all those whose estate he had, at their own cost and time out of mind, repaired and ought to repair such quay or pier; and had of right taken a reasonable toll (called *barleyage*), to wit, three Winchester bushels of barley out of every ship's cargo brought upon the quay or pier, to be exported in any ship. The plea then alleged that the plaintiff brought upon the quay 1,200 Winchester bushels of barley to be so exported. A verdict having been found for the defendant, it was pleaded in arrest of judgment that the prescription, as set forth in the plea, was bad—being to take a certain out of an uncertain quantity: that it was uncertain, because "cargo" was too general, and unreasonable, as one fixed toll of varying quantities. But the Court held the prescription good; observing that the word "cargo" was a mercantile word well understood.⁴

¹ Under 22 Car. II. c. 11, and Order of Council of 1st March, 1674.

² *Stephens v. Coster*, 3 Burr. 1409; 1 W. Bl. 413, 423.

³ *Wyatt v. Thomson*, 1 Esp. 252; see Gunning, p. 126.

⁴ *Serjeant v. Read*, 2 Stra. 1228; 1 Wils. 91.

So, again, where the Corporation of Newcastle claimed 5*d.* for every chaldron of coals exported, and it was contended that this was unreasonable and excessive, being 5*d.* duty for a quantity of coals which was only worth 2*s.*: as the value of the coals did not appear on the pleadings, the Court observed that they could not say that the toll was excessive.¹

*Kingston-upon-Hull Dock Co. v. La Marche*² was an action of *indebitatus assumpsit* for wharfage, with the usual money counts. Plea—the general issue. The facts disclosed were that, by an Act of Parliament, certain persons were incorporated as the Hull Dock Company; that premises (before the property of the Crown) were given to them for the purposes of the Act; and that they were authorized to make a dock, quays, wharves, &c. which, it was enacted, should be vested in them for the purposes of the Act. Amongst other things it was provided that “All goods, &c. which should be landed or discharged upon any of the quays or wharves which should be erected by virtue of the Act, should be liable to pay, and should be charged and chargeable with the like rates of wharfage and payments, as were usually taken or received for any goods, &c. loaded or discharged upon any quays or wharfs in the Port of London:”—Held, that, as the premises were only vested in the company for the purposes of the Act, they had *no common law right* to a compensation for the use of them; and that the statute did not give them any right to claim wharfage for goods *shipped off* from their quays: Lord Tenterden, C. J., who delivered the judgment of the Court, saying: “Two points were made on behalf of the plaintiffs in this case—first, that they, as owners of the wharf, were at common law entitled to remuneration for the use of the wharf; and *secondly*, that they had such right upon the words of the statute. Our opinion is against them on both points. On the first we think that, under the statute in question, the plaintiffs cannot claim anything that is not expressly given.”³

Tolls for
harbours,
lighthouses,

The class of tolls now to be treated of, as well as those payable on canals, which it is proposed to consider in the next section,

¹ *Vinkensterne v. Edden*, 1 Lord Raym. 384; 1 Salk. 238; 5 Mod. 359; Carth. 357.

² 8 B. & C. 42; 32 R. R. 337; see, too, Gunning, p. 126.

³ Cf. as claims for wharfage, *Haspurt*

v. Wills (1 Mod. 47; S. C., 1 Vent. 71; S. C., 1 Sid. 54, nom. *Heshod v. Wills*, S. C., 2 Keb. 624, 665), and *Colton v. Smith* (1 Cowp. 47), both of which see *ante*, note 5, p. 558.

are levied almost entirely by the authority of particular statutes ; and all the decisions in both cases turn almost entirely on the construction of these special Acts. It will be therefore convenient to notice here two general principles which seem to apply in all such cases, before proceeding to consider them in detail.

It is to be observed, firstly, that the prerogatives of the Crown cannot be affected except by express legislative enactment—a rule which is very clearly explained by Cockburn, C. J., in *The Mayor of Weymouth v. Nugent*,¹ with express reference to tolls.

docks and
piers are
statutory
tolls.

Exemption of
the Crown
from toll.

The other principle to be noted may be best stated in the words of Lord Brougham in *Stockton and Darlington Railway v. Barrett*.² “It must be observed,” said his Lordship, “that, *in dubio*, you are always to lean against the construction which imposes a burthen on the subject. The meaning of the legislature to tax him must be clear. It was so held in *The Hull Dock Company v. Browne*,³ which both parties in this case relied on, though for different purposes ; and which the plaintiffs in error especially cited in support of the argument for them. The like law was laid down by the Court of King’s Bench in the case of a company claiming against the public. *Gildart v. Gladstone*⁴ and other cases entirely concur in the same reasonable view. The Court there said in effect, Here is a company which gets an Act of Parliament to tax the subject ; it is incumbent upon that company to do two things :—to take care that the Act of Parliament is made clear and undoubtful, especially upon those clauses by which the company seeks to impose a burden upon the public ; and if companies do not choose to take the trouble to do that, let them abide by the consequences ; they will not be able to levy the duty. But here the question is of an exemption or restriction of the duty imposed. The Article in question restricts the duty on exported coal to a halfpenny, being 3½d. less than the second Article allows, making it one-eighth part only of the tax : therefore we are, according to the books cited, to lean in favour of the construction, where it is

Meaning of
the legisla-
ture to tax
the subject
must be
clearly ex-
pressed where
a burthen is
imposed.

¹ 11 L. T., N. S. 672. See the judgment of Cockburn, C. J. ; and cf. as to vessels employed in the service of the Crown, *Master of Trinity House v. Clark*, 4 M. & S. 288 ; see Woolrych, p. 304 ; *Vallego v. Wheeler*, Camp. 143 ; and *R. v. Jones*, 8 East, 451 ; *Trinity Corporation v. Staples*, 2 Ch. Rep. 689 ; *Smithett*

v. Blythe, 1 B. & A. 509 ; 35 R. R. 358 ; see Woolrych, p. 304 ; *Hamilton v. Stow*, 5 B. & A. 649 ; see Woolrych, p. 305 ; Gunning, p. 121.

² 11 C. & F. 590 ; 8 Scott, N. R. 641.

³ 2 B. & A. 43 ; 36 R. R. 459.

⁴ 11 East, 675 ; 12 East, 439 ; 2 Taunt. 97.

"doubtful, which, by extending the limits of the port, enlarges the bounds of the exemption from the special taxation."¹

We will now note a few of the decisions on Acts relating to lighthouses and harbours and docks.

Lighthouses.

It is well known that the beaconage and lighthouse duties² demanded by the corporation of the Trinity House are authorized by Parliament by reason of their evident utility,³ but there must be some benefit accruing to the vessels chargeable for the dues so demanded.⁴

Hence, it has been held that British ships in passing by the Eddystone and other lighthouses in the Channel, not touching at any place in Great Britain or Ireland, are not liable to pay the lighthouse duties to the Trinity House,⁵ and where a harbour Act⁶ gave the trustees a duty of sixpence per ton on every British or foreign ship sailing from, to, or by Ramsgate, or coming into the harbour there, the Court were of opinion that such duty was not payable by a vessel passing on the north-east side of the Goodwin Sands, and not through the Downs;⁷ nor by a foreign ship sailing from a place in Norway for Falmouth, and which, in the course of her voyage, sailed four leagues south-east of the Goodwin Sands, and did not put into the Downs, nor sail within sight of Ramsgate.⁸

Exemptions
of the Crown
and its
servants.

It has been noted above that the Crown is, unless expressly charged, exempt from payment of tolls. Thus, the exception of her Majesty's ships of war in an Act empowering the promoters of a lighthouse to take tolls was held not to warrant the inference that other ships belonging to the Crown were chargeable. The exception might be *ex majori cautela*.⁹

Where the owner of a ship chartered it to the commissioners of transport service on behalf of the Crown, it was considered that a temporary ownership in the vessel thereby passed to the

¹ Cf. as to this principle, Tindal, C. J., in *Barrett v. Stockton and Darlington Railway*, 2 Scott, N. R. 337; 2 M. & G. 134, where, in addition to *Gildart v. Gladstone*, 11 East, 675; 12 East 429; 2 Taunt. 97; *Hull Dock Co. v. Browne*, 2 B. & Ad. 58; 36 R. R. 459; *Leeds and Liverpool Canal Co. v. Hustler*, 1 B. & C. 424; 2 D. & R. 556; 36 R. R. 746, 748; and *Britain v. Cromford Canal Co.*, 3 B. & Ald. 139; were cited in support of it. See, too, *Casher v. Holmes*, 2 B. & Ad. 592; 36 R. R. 680.

² Profits from tolls of a lighthouse are real estate and not subject to probate or legacy duty: *A.-G. v. Jones*, 1 Mac. & G.

574; see remarks of Cotton, L. J., in *In re Christmas*, 33 Ch. D. 332, at p. 342.

³ *Trinity House v. Sorabie*, 3 T. R. 768, note (a).

⁴ *Ibid.*; *Matson v. Scobell*, 4 Burr. 2258; *Poole or Pole v. Johnson*, 2 Sir W. Bl. 764.

⁵ *Trinity House v. Sorabie*, 3 T. R. 768; see Woolrych, p. 304.

⁶ 22 Geo. II. c. 40.

⁷ *Matson v. Scobell*, 4 Burr. 2258.

⁸ *Poole or Pole v. Johnson*, 2 Sir W. Bl. 764.

⁹ *Smithett v. Blythe*, 1 B. & A. 509; 35 R. R. 358.

Crown, and that he consequently, during the voyages made in the course of such employment, was not considered as owner within the charters granted to the Trinity House which imposed lighthouse duties and duties for buoyage and beaconage on the owners or masters of ships.¹ Similarly a vessel hired by the Postmaster-General to carry the mails and government despatches to and from Dover to Calais, &c., the master of which was permitted to carry passengers and their luggage, and bullion upon freight, was held to be a vessel within the exception of an Act imposing a tonnage duty on vessels coming into the harbour of Dover, but which contained an exception in favour of all vessels employed on her Majesty's service:² Abbott, C. J., said,³ "The statute contains two exemptions,—1st, all vessels belonging to his Majesty; and, 2nd, all vessels employed in his service; the case of *Rex v. Jones*⁴ is a good authority to show that the vessel in this case belonged to the captain and not to the king; but it does not apply to the latter branch of exemption. It is impossible to say that this vessel was not employed in his Majesty's service when it came into Dover. The captain is appointed by the Postmaster-General. The appointment of the captain states the vessel to be employed in his Majesty's service, and he is directed to obey such orders as he shall from time to time receive from the agents of the government. This latter stipulation is quite inconsistent with the right of employment being in the captain. Whatever is taken on board the vessel besides the mails and despatches is by the express permission of government. I am clearly of opinion that this vessel was at the time of committing the trespass in the service of his Majesty."

All the cases regarding the rights and duties of harbour trustees will be found to depend, like the above, on the construction of particular statutes. Piers and harbours.

Where an Act for keeping in repair a harbour imposed certain duties on goods exported and imported, and under the head "metals," certain specified duties were imposed on copper, brass, pewter, and tin, and on all other metals not enumerated in the

¹ *Master of the Trinity House v. Clark*, 4 M. & S. 288; cf. *Vallego v. Wheeler*, Cowp. 143; *R. v. Jones*, 8 East, 451; 9 R. R. 368; *Trinity House v. Staples*, 2 Chit. 689.

² *Hamilton v. Stow*, 5 B. & A. 649; see, too, Woolrych, p. 305; Gunning,

p. 121.

³ *Smithett v. Blythe*, 1 B. & Adol. 509; 35 R. R. 358.

⁴ 8 East, 451; 9 R. R. 368; cited for the defendant, the harbour-master of Dover.

schedule of the Act, for every 10*l.* value 10*d.* ; it was held, that the latter words did not include gold and silver ; and, therefore, that the commissioners were not entitled to demand for specie or bullion 10*d.* for every 10*l.* value.¹

In the case of *Jones v. Phillips and others*,² certain harbour commissioners under a local Act of Parliament³ were authorized to charge a sum not “ exceeding 1*d.* for every ton or less quantity “ than a ton, and for every package and parcel of goods, wares, “ merchandise, &c. exported or imported over the bars of certain “ rivers ; ” and the question for the opinion of the Court was whether the commissioners could legally claim 1*d. per box*, harbour dues on certain exported boxes of tin plates, which formed part of and composed one entire shipment in one vessel, to the same consignee, at a uniform rate of freight on the quantity of tons weight ; or whether the sum was to be charged for at the rate of 1*d. per ton* :—Held, that they were entitled to charge the former rate, and were not bound to charge 1*d. per ton* weight.

The words “ shipped for exportation ” are not necessarily restricted to an exportation to foreign countries, but may mean exportation in its widest sense ; that is, a carrying out of a port.⁴

A Railway Act empowered the proprietors to levy on all coals carried along any part of their line, such sum as they should direct, “ not exceeding the sum of 4*d.* per ton per mile.” It then went on thus : “ And for all coal which shall be shipped on “ board of any vessel, &c. in the port of Stockton-upon-Tees “ aforesaid, for the purpose of exportation, such sum as the said “ proprietors shall appoint, not exceeding the sum of ½*d.* per “ ton per mile.” Held, that with respect to coals shipped for exportation, this was not a cumulative but a substituted toll.

Held, also, that the words “ the port of Stockton-upon-Tees “ aforesaid ” meant the whole port of that name, and was not restricted to the port of the town of Stockton-upon-Tees ; and that there was not such an ambiguity in the enacting part of the Act as to compel a reference to the preamble of it ; and that the

¹ *Casher v. Holmes*, 2 B. & A. 592 ; 36 R. R. 680.

² 7 Exch. 85 ; 21 L. J., Exch. 7.

³ 55 Geo. III. c. clxxxiii.

⁴ *Stockton and Darlington Railway v. Barrett*, 11 C. & F. 590 ; 8 Scott, N. R. 641 ; and cf. on this point the remarks of Tindal, C. J., in *Barrett v. Stockton and Darlington Railway* (2 Scott, N. R. 337 ; 2 M. & G. 134), who there com-

ments on *Gildart v. Gladstone* (1 East, 685), per Lord Ellenborough ; *Kingston-on-Hull Dock Co. v. Browne* (2 B. & Ad. 58 ; 36 R. R. 459), per Lord Tenterden ; Bayley, J., in *Leeds and Liverpool Canal v. Hustler* (1 B. & C. 424 ; 2 D. & R. 556 ; 36 R. R. 746, 748) ; and Holroyd, J., in *Britain v. Cromford Canal* (3 B. & Ald. 139).

word "aforesaid" did not limit the expression to the port of the town as described in that preamble.

Another Act, passed on the same subject, after reciting the former Act, and also reciting that the proprietors had been at great expense in forming inclined planes on the line of railway, authorized them to demand "for all articles, &c. for which a "tonnage is hereinbefore directed to be paid, which shall pass "any inclined plane upon the said railway, such sum as the said "proprietors shall appoint, not exceeding the sum of 1s. per "ton :"—Held, that this was a cumulative charge.

It was recited by stat. 48 *Geo. III. c. civ.* that the harbour of *Berwick-upon-Tweed*¹ had gone to decay for want of funds, and that it was expedient that the duties on goods should be fixed, and vested in commissioners, to be by them applied for the purposes of the Act, and commissioners were appointed for carrying the Act into execution, and empowered to rebuild the pier of the harbour, to deepen the harbour, to remove obstacles, to set up within the harbour jetties, posts, &c. for carrying on the navigation, and rendering the harbour more commodious, and for other works and conveniences, as they should think fit; and to make and repair quays, wharves, and docks, for the better accommodation of shipping. Duties, to be paid to the commissioners, were imposed, according to a schedule, on goods "imported into or "exported from the said harbour." It was enacted that the said harbour should be deemed to extend down the Tweed and its shores, from the bridge over the Tweed to the sea. A vessel brought goods from the sea into the harbour, made some use of the posts erected therein by the commissioners, and passed, without otherwise using the harbour, under the bridge, up the river, and landed the goods at a point above the bridge within the flow of the tide, where there was no harbour :—Held (on a special case, which empowered the Court to draw inferences of fact), that the goods were not imported into the harbour, and therefore not liable to duty, although the schedule of duties spoke of "goods imported and shifted to another vessel for exportation "and not landed."²

In *Ribble Navigation Company v. Hargreaves*,³ which was an action brought to recover from the defendant the amount of

¹ *Wilson v. Robertson*, 4 El. & Bl. 923; 1 Jur., N. S. 755.

⁴ El. & Bl. p. 931.

⁵ 17 C. B. 385; 25 L. J., C. P. 97.

² See remarks of Lord Campbell, C. J.,

certain tolls imposed by the 71st section of the Ribble Navigation Act,¹ in respect of goods "carried or conveyed in or upon the "river Ribble," for every time of passing "the Ribble Sea Line" and "the Ribble Inner Line" respectively. The point raised was the meaning of the terms "owner," "shipper" as governed by sects. 3, 42 and 45 of *The Harbours, Docks and Piers Clauses Act, 1847* (10 & 11 Vict. c. 27), which is incorporated with the special Act, and it was held, that one who delivers goods on board a vessel provided by the purchaser is not the "owner" or the "shipper" within the statutes, so as to be liable to an action for the tolls imposed by the 71st section of the special Act.

Where² the defendants were empowered by a local Act to levy tolls on all goods landed within their harbour, and in pursuance of a practice which had continued for many years, stones brought along the coast into the harbour were shot from the plaintiff's boat on to the shore, below high water mark, and remained on the spot where they were deposited till they were shipped for exportation from the harbour:—It was held that the stones were not landed within the meaning of the Act.

Dock dues dependent entirely on Act of Parliament creating the dock.

Dock dues are payments made to the owners of docks by the owners of ships using the docks in proportion to the tonnage³ of the ship, and by owners of goods, viz., by shippers when they are entered at the customs-house.⁴

Mr. Gunning, in his work on *Tolls*,⁵ points out that the right to dock dues depends in every case upon the particular Act of Parliament under which the docks are erected, and is quite distinct from the question of ports and port dues, and that the property in a port and that in the docks situated within the town which is the head of the port, is frequently in different persons, and he cites Liverpool and London as instances.

The powers and rights of owners of docks are usually expressed in the Act of Parliament under which they are erected, and when that is the case they cannot be exceeded.⁶ Where the Act is silent on this point the public have a right to enjoy the privilege of using the docks upon "reasonable terms," and the owner cannot impose what tolls or duties he pleases on them.⁶

¹ 16 & 17 Vict. c. clxx.

² *Harvey v. Mayor and Corporation of Lyme Regis*, L. R., 4 Exch. 260; 38 L. J., Ex. 141; see remarks of Bramwell, B., as to the term "landed."

³ As to right to recover excess rates paid under invalid regulations, see *Moss*

v. Mersey Docks, 26 L. T. 425; 20 W. R. 700.

⁴ Renton's Encyclopædia of the Laws of England, 327.

⁵ Page 129.

⁶ *Allnutt v. Inglis*, 12 East, 527; 11 R. R. 482.

The question as to the reasonableness of a particular toll is for the Court and not for the jury to decide.¹ The jury are to give their verdict according to the invariable and reasonable custom, the judge alone can decide whether such tolls are reasonable or not.²

The reasonableness of a toll is for the Court and not the jury to decide.

The term "port" is used in its popular sense when the limits of a place liable to the burden of dock duties requires a legal construction.³ Thus Goole, which is without the port of Hull, was held not liable to such duties, although Goole and Hull might be considered as a district for the purposes of revenue. But a vessel proceeding with a cargo taken in at Goole to Hull is liable for tonnage.⁴

Meaning of term "port."

Dock duties, when assigned by virtue of an Act of Parliament, are not mere chattels but charges upon the docks; and it was accordingly held that an auctioneer could not be called upon to pay the duty upon them when viewed in any other light than as interests in land.⁵

Assignment of dock dues.

It would be out of place here to enumerate all the various decisions on special Acts relating to docks. We shall, therefore, merely select from the cases on the West India Dock Acts and the Liverpool Dock Acts such as seem to embody important principles.

The case of *Allnutt v. Inglis* has already been alluded to⁶ as turning on points relating to wharfage payable to the London Dock Company;⁷ *Harden v. Smith* and *Shrøder v. Smith*⁸ were important cases with regard to the West India Dock Acts.

London Docks. Decisions as to dues.

These were actions for money had and received, money paid, &c., which were brought against the defendant as treasurer of

¹ 2 Inst. 222; *Vinkensterne v. Ebdon*, 1 Lord Raym. 384; 1 Salk. 248; 5 Mod. 366; Carth. 357; *Corporation of Stamford v. Paulet*, 1 C. & J. 57; 35 R. R. 675; *S. C.* in error, 1 C. & J. 400.

² *Lowden v. Hierons*, Holt, N. P. C. 647; 2 B. Moo. 102; 2 Inst. 222; 19 R. R. 542; *Wright v. Brewster*, K. B., November, 1832; 38 R. R. 232.

³ *Kington-upon-Hull Dock Co. v. Broune*, 2 B. & A. 43; 36 R. R. 459; see Woolrych, p. 318: and Gunning, p. 112, note 2.

⁴ *Hull Dock Co. v. Priestley, S. C.*, 1 Nev. & M. 85; see Woolrych, note (c), p. 318, and *ante*, p. 50. As to the meaning of "town dues" under 23 & 24 Vict. c. 125, see *Mercay Docks v.*

Hunter, Craig & Co., 80 L. T. 96; 8 Asp., M. C. 489; as to when harbour dues are an interest in land within the Mortmain Act, 9 Geo. II. c. 36, see *In re Christmas*, 33 Ch. D. 332; *In re David*, 43 Ch. D. 27; *Ion v. Ashton*, 28 Beav. 379.

⁵ *Rea v. Winstanley*, 8 Price, 180; 22 R. R. 743.

⁶ 12 East, 527; 11 R. R. 482; see *ante*, p. 572.

⁷ As to the meaning of "grain" under the Port of London Act, 1872, s. 4, see *Cotton v. Voyren & Co.*, (1896) App. Cas. 457; 65 L. J., Q. B. 686; 76 L. T. 598—H. L. (E.); see also *Scott v. Tylor*, 48 J. P. 426.

⁸ 8 East, 16.

the West India Dock Company¹ to recover back certain sums which had been paid by the plaintiff (who had purchased certain hogsheads of sugar before then imported from the West Indies into the port of London, which had continued all the time in the company's warehouses, and for which all the importation rates and duties had been satisfied), to the officers of the company for wharfage, and for shipping into lighters sent into the docks by the plaintiffs for that purpose, the same hogsheads of sugar, part for home consumption, part for exportation. The company, on the one hand, contended, that they were only bound, in consideration of the rates and duties received upon importation of the goods, to deliver the same free of further charge from their warehouses by inland carriage; the plaintiffs, on the other hand, maintained, that they had a right, for the same compensation, to receive the goods from the warehouses across the quays, and by means of the cranes thereon into their lighters and so remove them by water carriage, as well as to receive and remove them immediately from the company's warehouses by land carriage. The West India Dock Company is incorporated by Act of Parliament, and sect. 137 of 39 *Geo. III. c. 69*, gives the company certain rates and duties for all goods imported from the West Indies which shall be landed, &c. from on board any ship entering into and using the dock; which rates are directed to be "accepted for the use of the docks and the quays, wharves and "cranes and other machines belonging thereto, and the land "waiter's fees on account of such goods, after being unshipped, "and all charges and expenses of wharfage, landing, housing, "and weighing such goods, and of such cooperage as the same "may want after being unshipped, and all rent for warehouse "room for twelve weeks, and all charges of delivering the same "from the said warehouses." The Court held that the latter words include a delivery of the goods into lighters in the dock, as well as any immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses, although for the purposes of such delivery into lighters it be necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. But it seems that if the owner require any work to be done upon the goods

¹ Cf. *Blackett v. Smith*, 11 East, 533, which was an action for wharfage and portorage against the same party. And see Woolrych, p. 317.

ultra the mere *transitus* of them from the warehouse to the lighters, the company are entitled to an extra compensation, to be settled by convention between the parties, as in other cases out of the Act.

*Blackett v. Smith*¹ was a decision on another part of the same section of this statute,² in which it was held, that the owner of a homeward-bound ship entering the West India Docks in so leaky a condition as to require immediate unloading and assistance, without waiting her turn to be unquayed and unloaded in rotation in the manner required by 39 *Geo. III. c. 69*, is bound to bear the extra expenses of labourers for pumping the ship after the crew are discharged, and for delivering the cargo into lighters in the outward dock or basin; also for coopering previous to such delivery into lighters; the company having afterwards unladen the cargo out of such lighters upon the quays, in the import dock and performed the requisite coopering, &c. upon such unloading, in the same manner as they would have done if the cargo had been delivered out of the ship itself in its proper time and place. Lord Ellenborough, C. J., in delivering judgment, remarked: "The law requires ships of this description "to go into the docks; and if they be in such a state when they "arrive there that they cannot wait for their proper turn to "unload, they must discharge their cargo at once, and if any "inconvenience or loss ensue to the owners from not being able "to do this in the manner prescribed by the Acts, it must be "attributed partly to regulations of the Acts and partly to the "leaky condition of the ship itself. It is a grievance, however, "which the Acts throw upon the owners, and not upon the "company. This is one of the fairest cases of defence for the "company which has come before us upon the construction of "these Acts. The rate of 6s. 8d. per ton for ships required "to be paid by the owners to the company for the charges and "expenses of navigating, unmooring, removing, and management of such ships in the docks, and for the unloading their "cargoes, &c. must be intended of the ordinary charges and "expenses of navigating, &c. for such ships as are in a reasonably navigable, moorable, unmoorable, removable, and manageable condition, and capable of complying with the requisitions "of the Acts; and it could never have been intended by the "legislature that the company should be obliged, in consideration

¹ 12 East, 518; see Gunning, p. 133.

² 39 Geo. III. c. 69.

“ of that rate, to take upon themselves all the extra expenses
 “ which ships, in the state of infirmity in which this ship
 “ presented itself to them, might require to enable her to
 “ discharge her cargo.”

Liverpool
 Docks.
 Decisions as
 to dues.

The case of *Gildart v. Gladstone*,¹ which turned on the construction of certain statutes incorporating and regulating the Liverpool Docks, is one of importance, in which the question as to what constitutes the same voyage out and home was discussed.

By the Liverpool Dock Acts of 8 Anne and 2 Geo. III., certain tonnage duties are payable to the dock company on all vessels sailing *with cargoes outwards or inwards*, so as no ship shall be liable to pay more than once *for the same voyage out and home*, if there be either an outward or an inward cargo on such voyage; but without making any advance if there should be both. Thus, a Liverpool ship carrying a cargo out to the West Indies, and bringing another home to Liverpool, is only liable to pay one duty, viz.—the duty *outwards*; and a foreign ship bringing a cargo to Liverpool, and carrying another out, is only liable to pay the duty *inwards*. But where a ship was built in another port, for an owner residing at Liverpool, where she was registered, and sailed to the West Indies without first coming to Liverpool, but brought her return cargo there as to her home; this was held to be one entire and distinct voyage within the meaning of the Acts, for which the duty *inwards* was payable, and did not privilege the ship from payment of the duties again, when next she sailed with another cargo upon her *outward* voyage to the *West Indies*, though, in fact, she only used the dock *inwards* on her first voyage; for the privilege of using the docks with an outward and inward cargo upon one payment of duty is confined to the *same voyage out and home*.²

The same point was raised in another action in which the same parties were concerned,³ where it was held that a voyage out from Liverpool with a cargo to Halifax in North America, where the ship delivered it, and took in another cargo there for Demerara in South America, and after delivering that returned to Liverpool with a cargo from Demerara, *was*

¹ In error, 11 East, 675; see, too, Gunning, p. 135; 12 East, 439; 2 Taunt. 97; and cf. Lord Brougham's remarks in *Stockton and Darlington Rly. v. Barrett*, 11 C. & F. 590; *ante*, p. 575.

² Irish linens imported to Bristol are

brought “from ports beyond the seas” and not “coastwise:” *Battersby v. Kirk*, 5 L. J., C. P. 166; 2 Bing., N. C. 584.

³ *Gildart v. Gladstone and Gladstone*, 2 Taunt. 97; *S. C.*, in error, 12 East, 439.

*all the same voyage out and home within the meaning of the Liverpool Dock Acts (8 Anne and 2 Geo. III.), and chargeable only with one tonnage rate for the use of the docks.*¹

Where, however, an Act provided that vessels trading *inwards* to the port of Liverpool should pay dock rates according to a fixed scale proportioned to the distance of the port from which they were trading, and that vessels arriving in ballast, but trading *outwards*, should pay in proportion to the distance of the port to which they were trading; it was held that a vessel that had discharged her cargo at a port in England, and taken on board ballast prior to sailing to Liverpool for the purpose of loading a cargo for the West Indies, and which took on board a bale of cotton and a few other articles, admittedly in order that she might pay dock rates as a vessel trading *inwards* from the port where she took on board such articles, and not as a vessel arriving in ballast, *was* a vessel arriving in ballast within the meaning of the Acts.²

The Southampton Dock Company are empowered by their Act, 6 Will. IV. c. xxix. s. 149, to charge for the landing of goods in their docks the several sums mentioned in the schedule thereto annexed, and for articles not therein particularized such sums as shall be equal to the sums affixed on goods, &c., "of "a similar nature, package, value, and quality" in the schedule. All the charges mentioned in the schedule were of small fixed sums—none being *ad valorem* except the charge for "sculptured "marble:"—Held, that the company were not entitled to make an *ad valorem* charge for the landing of goods not enumerated, or at all approaching in "nature, value, and quality" to those enumerated in the schedule.³

*Southampton
Dock Co. v.
Hill.*

By a local Act,⁴ a toll or tax of $\frac{1}{4}$ d. per chaldron is imposed upon the owners or lessees of "any collieries or coal mines near "the river Tyne," for every chaldron of coals sold or delivered by them to be exported from or out of the said river, and which shall be so exported; such toll "to be collected or received at the "offices or places respectively where the contracts for the sale "or delivery of such coals are usually made," in aid of the Tyne

*Tyne Coalmen
v. Davison.*

¹ Ibid.; cf. on this point, *Trustees of Liverpool Docks v. Gladstone and another*, 5 M. & S. 328; see Gunning, p. 137; and *Kingston-upon-Hull Dock Co. v. Huntingdon*, 2 Chit. Rep. 597; see Woolrych, p. 315.

² *De Gartheig v. Mersey Docks and Harbour Board*, 37 L. T., N. S. 411—C. P. D.

³ *Southampton Dock Co. v. Hill*, 14 C. B. 243; 11 W. R. 646.

⁴ 1 Geo. IV. c. liii.

Keelmen's Charitable Fund, created by 28 *Geo. III. c. 59*. Since the formation of railways and docks, the services of the keelmen in the shipment of coals on the Tyne have become unnecessary, the coals being brought down to the wharf or quay by railways and shipped direct:—Held, that coals shipped on the Tyne from collieries “near” to the river were still liable to the payment; and that a colliery situate ten miles from the Tyne is “near the” “said river Tyne” within the meaning of the Act. Held, also, that coals brought for shipment to the Tyne by a public railway from collieries which, before the formation of railways, had always shipped their coals on the river Wear, to which they had been conveyed by private tramways from the collieries, were equally liable to the keelmen's dues.¹

*Dresser v.
Bosanquet.*

The Commercial Dock Company was created by 50 *Geo. III. c. 207* (local and personal declared public). 51 *Geo. III. c. 66* (local and personal declared public), empowered them to distrain and sell ships for non-payment of rates and charges due for dockage of ships, receiving, warehousing, and storing goods; and if any consignor or consignee of any goods or merchandise neglects or refuses to pay rates or charges, the company may detain goods, &c. until paid, and, if removed before payment, may distrain any goods of the owner, consignor, or consignee, and detain and sell same, or may prosecute actions for those duties. 10 & 11 *Vict. c. 27, s. 45*, contains similar provisions, which by 14 & 15 *Vict. c. xliii.* are extended to the Commercial Dock Company. The plaintiff having purchased from the owners some timber stored at the Commercial Docks, and which was entered in the books of the company in the name of a broker, the company refused to transfer the timber into the name of the plaintiff, on the ground that the broker was indebted to them for rent and charges in respect of other goods standing in his name in the books of the company, although the plaintiff tendered to them the specific rent and charges due in respect of the goods purchased by him:—Held, 1st, That the above statutes conferred on the company no right to do so; 2nd, That the company could not rely on any general lien to that extent by the common law, supposing that such existed, as the statutes must be taken to displace such right.²

¹ *Society of Guardians of Keelmen of the Tyne v. Davison*, 16 C. B., N. S. 612; *Society of Guardians of Keelmen of the*

Tyne v. Elliott, 16 C. B., N. S. 622.

² *Dresser v. Bosanquet*, 4 B. & S. 460; 34 L. J., Q. B. 374.

"Those who seek to impose a burthen upon the public should take care that their claim rests upon plain and unambiguous language," said Bayley, J., in *Leeds and Liverpool Canal v. Hustler*.¹ This principle, which has been confirmed by several important decisions,² applies very fully to canal tolls; for where a canal is made by Act of Parliament, the right to take tolls is derived entirely from the Act, and is to be considered as a bargain between the owner and the public; and where there is any ambiguity, it must be construed against the canal proprietors, who can claim nothing which is not given them by the Act.³

Tolls on canals.

Right to derived entirely from the Act of Parliament creating.

There appears to be no obligation on a company, however, to impose an equal toll on all persons, provided they keep within the amount appointed by their Acts,⁴ though on grounds of public policy such an equality may be desirable for the public, who have an interest that the canal should be kept up, and the tolls consequently to be kept as equal as possible.⁵ The legality of canal tolls is now, however, regulated by 51 & 52 Vict. c. 25.⁶

No obligation on companies to impose equal tolls.

¹ 1 B. & C. 424; 2 D. & R. 556; 36 R. R. 746, 748.

² *Britain v. Cromford Canal*, 3 B. & Ald. 140; *Hull Dock Co. v. Browne*, 2 B. & Ad. 58; 36 R. R. 459; *Gildart v. Gladstone*, 11 East, 675; *Barrett v. Stockton and Darlington Rly.*, 2 Scott, N. R. 337; 2 M. & G. 134; *Stockton and Darlington Rly. v. Barrett*, 11 C. & F. 590; 8 Scott, N. R. 641.

³ *Stourbridge Canal v. Wheely*, 2 B. & A. 793; 36 R. R. 746; see, too, Woolrych, p. 312.

⁴ Cockburn, C. J., in *Hungerford Market Co. v. City Steamboat Co.*, 7 Jur., N. S. 67; see *ante*, p. 553.

⁵ *Lees v. Manchester and Aston Canal*, 11 East, 645; 11 R. R. 297.

⁶ The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25) empowers the railway and canal commissioners to hear and determine any questions or disputes involving the legality of the statutory tolls levied by canal companies and to enforce payment of such tolls or so much of it as they decide to be legal; and if any company charges one trader or class of traders in any district lower tolls than they charge other traders, this is, *prima facie*, an undue preference (sects. 10, 27 (1), 36). Sect. 15 of the Regulation of Railways Act, 1873, 36 & 37 Vict. c. 48, is made applicable to the charges of a canal company; and the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, as amended by that

Act, is extended to any person whose consent is required to any variation of any rates, tolls, or dues charged for the use of any canal, or by any canal company, "in like manner as if such person were a canal company, and the expressions 'canal company' and 'railway and canal company' in the said Acts and this Act shall be construed accordingly to include such person" (sect. 37 (1) (2)). The provisions of these Acts respecting rates apply to the tolls and dues of every description chargeable for the use of any canal, and the commissioners may enforce any order for a through rate or toll which may in their opinion be required in the interest of the public. Any company allowing traffic to pass from a canal on to any other canal or any railway, or from a railway on to a canal, shall be deemed to be a forwarding company, and the allowing of traffic so to pass shall be deemed to be the forwarding of traffic within the meaning of the above-mentioned Acts; and their provisions, and those of the Act of 1888, with respect to through rates, are extended to any canals which, in connection with any river or other waterway, form part of a continuous line of water communication, notwithstanding that tolls may not be leviable by authority of Parliament upon such river or other waterway (sect. 37 (3) (4) (5)). Where a railway company has the control over,

At common law tolls only become due at the end of a voyage, since the contract is not completed till the port of delivery is reached, and though this may be altered by legislative enactments so as to make tolls payable at intermediate distances, they must be demanded according to the rules of law respecting the carriage of goods from one place to another.¹ It is in accordance with these facts that, as a general rule, the principle seems to be that Acts imposing a toll should be construed as strictly as possible,² since, as has been said by a learned judge, "though such construction may be perhaps inconvenient, the Court cannot make a new toll."³

No general rules applicable to.

"No general rules or principle," says Gunning,⁴ "can be laid down applicable to canals in general"; and this is evident when it is remembered that in the case of canals, as in that of docks and harbours, each is dependent upon a particular Act, and therefore, as is pointed out by Woolrych,⁵ "since the cases which have arisen were decided upon the construction of the several statutes relating to each particular subject, the general principle is rather to be gathered from the effect which the Courts have given to the enactments themselves, than from the decisions."

We shall, therefore, consider such cases as seem to be most important.

In the case of *The Stourbridge Canal v. Wheely*,⁶ the plaintiffs

or the right to interfere with respect to the traffic conveyed or the tolls levied on a canal, and the tolls, rates, or charges levied are proved to be calculated to divert traffic to the railway to the detriment of the canal or of persons sending traffic over it or other canals adjacent to it, the commissioners, on the application of any person interested, may make an order requiring them to be altered in such a manner as to be reasonable in comparison with those charged for the conveyance of merchandise on the railway. If the alteration is not made within the time prescribed by the order, the commissioners themselves are empowered to make such alteration as they shall think just and reasonable by order, and the tolls, rates and charges so altered and adjusted are binding on the company or persons owning or controlling the traffic or the tolls levied thereon. No application may be made under this section until the Board of Trade have certified the fitness of the applicant, and that

the application is a proper one for submission to the commissioners; and the commissioners may make no order unless the company and persons have been previously served with notice of the application in such manner as the Board of Trade may direct. On the application of any company or person affected thereby, and after notice to and hearing such companies or persons as they may by any general rules or special order prescribe, the commissioners may at any time rescind or vary any order made under this section (sect. 38).

¹ Buller, J., in *Rex v. Page*, 4 T. R. 549; 2 R. R. 454; cf. *Rex v. Aire and Calder Navigation*, 2 T. R. 660; 1 R. R. 579.

² Woolrych, p. 306.

³ Ibid.; Bayley, J., in *Britain v. Cromford Canal*, 3 B. & A. 140.

⁴ Page 102; cf. Woolrych, p. 306.

⁵ Woolrych, p. 306. A canal Act is not necessarily a public Act: 1 Moo. & Malk. 421; *Brett v. Beales*, 10 B. & C. 508; 34 R. R. 499.

⁶ 2 B. & A. 793; 36 R. R. 746.

made a canal on two levels, which were connected by locks. On the upper level there was no lock. By their Act all persons were to be at liberty to navigate the canal on payment of certain rates, and the company were authorized to take certain tolls for certain goods which might pass through one or more of the locks, while owners of adjoining lands might use pleasure boats not carrying goods, so long as they did not pass through any locks, without paying dues:—Held, that the Act gave no right to demand tolls for boats navigating the level of the canal where there were no locks.

96 *Geo. III. c. 67*; empowered certain persons to make the Tamar navigable for boats, barges, and other vessels, with proper cuts and deviations from the sides thereof, from M. Quay to Boat Pool; and thence to make a canal, and to make and maintain a collateral cut or canal navigable for boats, &c. from the said canal to R. mill, and authorized them, in consideration of expenses, to take from time to time tolls at so much per ton per mile for goods, &c. “carried upon the said navigation, canal, cut, or any “of them.” They had expended considerable sums in clearing and deepening the river for the purpose of making it navigable to a point about one-quarter mile of Boat Pool, but had not made the canal or collateral cut:—Held, that they were entitled to recover tolls for carriage of goods over the part of the river made navigable.¹

Where a canal company were authorized by their Acts to make a canal and do other things necessary for the making, improving and using it; but were forbidden to make more than 8 per cent. profit, and were to lay their accounts annually before justices:—It was held that they were authorized by their Act to deepen and widen the canal after it had been completed (that being beneficial to the public); and that the widening and deepening being done at the request of those using the canal, the charge for so doing was a charge attending the using of the canal.²

In another case³ under the same Acts, it was shown that the company were empowered to “make all such other works as “they shall think necessary or proper for effecting, completing, “maintaining, improving, and using the said canal and other “works,” and that they were required to lay before sessions an

¹ *Tamar Navigation v. Wagstaffe*, 4 B. & S. 288; cf. *Reg. v. Simpson*, (1901) 2 Ch. 671 (C. A.); *ante*, pp. 552, 553.

² *Reg. v. Glamorganshire*, 7 B. & C.

722.

³ *Reg. v. Glamorganshire*, 12 East, 156; see Woolrych, p. 310.

annual account of the tolls collected, and of the charge of supporting the navigation. The sessions were authorized under certain circumstances to reduce the canal rates. After the completion of the canal, and after the first account of the capital expended in the undertaking had been delivered upon which the dividends were to be calculated, the company deemed it necessary to erect a reservoir and steam engines. When applying to have an annual account allowed the company included the expenses of these new works, but certain freighters of the canal having objected to the items, the justices disallowed the sums in question, although it appeared in evidence before them that the works had been erected for the support and improvement of the original line of road, and for the better supplying it with water in dry seasons. This order being brought before the Court of King's Bench by *certiorari*, was quashed, it being held that, though the works were new in specie, yet, being for the maintenance of the old canal and works, they were justifiably made. Had they been colourably executed for the benefit of individuals, the charges might and would have been repudiated; but this was not so, and the sessions having proceeded on a wrong principle, their order could not stand.

It has been held that no toll was imposed on empty boats by the provision in a canal Act, that no boats navigating thereon of less burthen than *twenty tons*, or which should not have a loading of *twenty tons* on board, should pass through any of the locks unless on payment of a tonnage equal to a boat of *twenty tons*.¹

A canal company was empowered to take tolls on all goods excepting manures, and it was also provided that no boat or vessel should pass through any lock unless such vessel should pay duty equal to what would be paid by a vessel loaded with thirty tons:—Held, that this only applied to toll-paying goods, and therefore that a vessel laden with manure was entitled to navigate the canal, and pass through the locks at any time without payment of any toll whatever.²

An Act of Parliament provided that the Monmouthshire Canal Company were not to take any higher toll for the time being than

¹ *Leeds and Liverpool Canal v. Hustler*, 1 B. & C. 424; 2 D. & R. 556; 36 R. R. 746, 748. Since this decision, 59 Geo. III. c. 10, has imposed a simple lockage duty of 5s. upon empty boats;

note (a), 1 B. & C. 424.

² *Grantham Canal Co. v. Hall*, 14 M. & W. 880; cf. *Hall v. Grantham Canal Co.*, 13 M. & W. 114; 13 L. J., Exch. 203.

the Brecknock Canal. The latter by general resolution lowered their tolls :—Held, that the company could not question collaterally the validity of such resolution, but were bound by it, Abbott, C. J., saying: “ If, indeed, without any colour of authority, the “ rates of the Brecknock Canal had been lowered the case would “ have been different.”¹

Where a canal Act imposed a toll on “ coal, lime, timber, “ bricks, stone, and all other goods, wares, or merchandise “ whatsoever,” gravel and materials for turnpike roads were held liable to toll.²

Lees v. Manchester and Ashton Canal Co.,³ has been already referred to with regard to the alteration of tolls.⁴ There the defendants, being authorized by their Act to take such tolls as were fixed at a general assembly (at the rate of not more than 1*d.* per ton per mile), and also to reduce rates at a general assembly, though not without the consent of the major part of the proprietors, made a contract with the plaintiffs (but not at a general meeting), whereby, in consideration of their making a cut from their collieries to carry water to the canal, and conveying the same to the company, the latter were to permit them to convey coals at a less rate. It was held that this contract was illegal and void, since it was a speculation by which the company might gain more or less than the legislature intended, and which would extend the company’s power to purchase land beyond the limits in the Act, and enable them to raise more capital. Also, that it was void because the tolls could only be reduced at a general meeting.

Lord Ellenborough, who delivered judgment, said, *inter alia*, “ The public have an interest that the canal should be kept up, “ and whatever has a tendency to bring it into hazard is an “ encroachment upon their right in it. They have also an “ interest that the tolls should be equal upon all ; for if any are “ favoured the inducement to the company to reduce the tolls “ generally below the statute rate is diminished. But as it is “ sufficient in this case to say that this bargain is not binding “ upon the company of proprietors, inasmuch as it abridges their “ rights in a way the statutes do not warrant, it is unnecessary “ to give an opinion whether it so interferes with the rights of “ the public as to be on that ground also void.”

¹ *Monmouthshire Canal v. Kendal*, 4 B. & Ald. 453.

³ 11 East, 645 ; 11 R. R. 297.

⁴ See *ante*, p. 544.

² *Coulton v. Ambler*, 3 Rail. Cas. 724.

Cockburn, C. J., commenting on these remarks in *Hungerford Market Co. v. City Steamboat Co.*,¹ said: "The observations of Lord Ellenborough go no further than to show that on grounds of public policy it may be desirable that such an obligation (*i.e.*, not to lower the tolls), should attach to the power of a public company to take toll; yet authority would certainly seem to be required to establish a position directly at variance with the well-known axiom, that every one is at liberty to renounce a right established in his favour."

By sect. 103 of 3 *Geo. IV. c. 126*, the proprietors or trustees of any canal, railway, or tramroad, on which any materials for the repair of turnpike roads may be conveyed, may reduce the tolls imposed by any Act of Parliament on the carriage of such materials, and appoint lower tolls, and reduced tolls may be collected and recovered in the same manner as the original tolls.² Also, although an Act should authorize the reduction of tolls, and provide for the appropriation of any surplus of rates, commissioners may again raise the rates if it should become necessary.³

The case of *The Medway Navigation v. Brook*,⁴ turned upon the construction of a private Act relating to the navigation of the Medway; by sect. 23 of which the plaintiffs were empowered to take from persons conveying goods upon the said river between Maidstone and Forest Row, or any part thereof (which all person or persons should and might lawfully do), certain rates and duties for lockage and riverage, which were not to exceed a given limit, and which, by sect. 28, the plaintiffs were from time to time to publicly fix up. By sect. 31, nothing in the Act is to be construed to extend the plaintiff's authority to the execution of any works below Mr. Edmond's wharf in Maidstone; and by sect. 38, any action, suit, or information for anything done in pursuance of this Act, or in relation to the premises, shall be commenced within three months after the facts committed. Maidstone extends along the river upwards, about three furlongs from Mr. Edmond's wharf to the College lock constructed by the plaintiffs, Maidstone Bridge being between the

¹ 30 L. J., Q. B. 25; 3 El. & Bl. 365;
3 L. T., N. S. 732.

² See Woolrych, p. 312.

³ *Ibid.*; *Goody v. Penny*, 9 Mees. &

W. 687. See also 8 & 9 Vict. c. 28,
ante, pp. 493 *et seq.*

⁴ 33 L. T., N. S. 843.

two. Plaintiffs, besides other works on the river, had scoured a shoal between the said bridge and Mr. Edmond's wharf, and on their annual survey they always disembarked at that wharf. In 1874, the plaintiffs having amended their toll list so as to charge for the first time tolls proportioned to a fractional part of a mile traversed, the defendant, who was owner of oil mills situate on the Medway less than a mile above the College Lock, but more than a mile above Mr. Edmond's wharf, refused to pay any toll upon barges coming up the river to his mills. Held, that the plaintiffs were entitled to charge tolls proportioned to a fractional part of a mile traversed since the amendment of their list, without reference to the three months' limitation provided by sect. 38.

In *Fisher v. Lee*,¹ it was held that blocks cut with wedges from the quarry, and, therefore, reduced to certain dimensions according to order, and squared with a pickaxe, to be used as railway sleepers, each being after such preparation worth ninepence more than unwrought stone of the same weight,—were liable to the toll as stones only, and not as merchandise under a Navigation Act,² which imposed a toll on “every ton of butter “or other goods, wares, merchandises, and commodities,” and a lower toll on “every ton of coals, cinders, lime, and lime-stone, stone, gravel, and manure.”

*Tame v. Grand Junction Canal Co.*³ also turned on the construction of certain canal Acts. By 33 *Geo. III. c. lxxx.*, the Grand Junction Canal Company were empowered to take tolls for the passage of manure between Braunston and Brentford. By sect. 97, persons occupying lands through which the canal passed might carry manure without payment. By 34 *Geo. III. c. xxiv.*, for making a cut to Buckingham, the powers and authorities mentioned in the former Act were to be exercised by the company and by the owners of land on the new cut as if re-enacted, and the like exemptions were to be allowed. By 35 *Geo. III. c. xliii.*, reciting the first-mentioned Act, the company were empowered to make a cut to Paddington; and the several powers, authorities, matters, and things in the recited Act contained, except the rates, were to be used and exercised *by the company*, and applied for making the cut and for ascertaining tolls, and in all respects as if re-enacted,

¹ 12 A. & E. 622; 4 P. & D. 447.

² 7 *Geo. III. c. 96.*

³ 11 Exch. 786; 25 L. J., Exch. 222.

and as if the cut had been part of the works authorized to be made by the first Act.

By 35 *Geo. III. c. lxxxv.*, for making a cut from Watford to St. Albans, reciting the before-mentioned Acts, the powers granted thereby were to be exercised by the company and by the owners of lands as if re-enacted; and the like exemptions were allowed:—Held, first, that on the construction of 35 *Geo. III. c. xliii.*, persons occupying land on the Paddington Cut could not carry manure on the canal free from toll; secondly, that the provisions of the several public local Acts with respect to tolls on different cuts, part of the same canal, might be compared in order to ascertain the meaning of a clause in the Paddington Act, alleged to create exemptions from tolls upon the Paddington Cut.

Beneficial interest in tolls renders a company liable for negligence in works.

Distress incident to tolls.

As has been noted above, the possession of a beneficial interest in the tolls of a canal renders a company liable to actions for nuisance where damage is caused by negligence with regard to their works.¹

A right of distress is incident to every toll.² Where a canal company was empowered by its Act to take tolls for goods, and in case of non-payment to distrain any carriage or goods in respect of which such tolls ought to be paid; it was held, that trams could not be distrained for arrears of tolls due from the owners for goods carried in them if they were not carrying goods of such owners at the time of distress.³ Similarly, in *Fraser v. Swansea Canal Co.*,⁴ it was held, that where a canal company were authorized to impose rates of toll for carriage of goods; and in case of non-payment to seize the goods and the boats laden therewith, and if such goods were not redeemed within seven days to sell the same; this clause did not empower them to distrain goods when no longer on the canal or to sell the boats.

Rates.

Rates.

It is proposed now to consider the liability of the various rights of water that have been treated of to be

¹ *Manley v. St. Helen's Canal*, 2 H. & N. 840; *Parnaby v. Lancaster Canal Co.*, 11 Ad. & E. 213; *Mersey Dock v. Gibbs*, 11 H. L. Cas. 686, &c.; *ante*, pp. 470 *et seq.*, 554.

² See *ante*, p. 555.

³ *Jenkins v. Croke*, 1 A. & E. 372.

⁴ 1 A. & E. 354; see, too, *Woolrych*, 61.

assessed for the payment of poor rates in the following order:¹

- I. Piers, Harbours, Docks, and Marine Property.
- II. Rivers and Ferries.
- III. Fisheries.
- IV. Canals.
- V. Water Companies; and
- VI. Bridges.

An estuary or arm of the sea is *primâ facie* extra-parochial; but this presumption may be rebutted,² and, with respect to the presumption of extra-parochiality, there is no distinction between the sea shore and the shore of a tidal river.³ By 31 & 32 Vict. c. 122, every accretion of the sea, whether natural or artificial, and the part of the sea shore to the low water mark, and the bank of every river to the middle of the stream, which at the date of Act were not incorporated with any parish, are for all civil and parochial purposes annexed to and incorporated with the next adjoining parish with which it has the longest common boundary.

Piers, harbours, docks, and marine property.

Estuaries and arms of the sea *primâ facie* extra-parochial.

Where a wet dock was constructed on a portion of land reclaimed from the ooze or bed of a navigable tidal river, and in order to prove that it was not part of the adjoining parish, evidence of perambulations of that parish, and of others abutting on other portions of the reclaimed land was given, which seemed to show that the rights of those parishes extended only to high water mark, but, against this, it appeared that in each of the parishes considerable tracts were reclaimed from the ooze or bed of the river, and rated to the poor; it was held, that the presumption of parochiality, arising from payment of these rates, outweighed the contrary presumption arising from the perambulations.⁴

¹ See the remarks on the history and development of this branch of law in Castle on the Law of Rating, 3rd ed. (chap. I. The principal authorities and statutes to be noted are:—The Mirror of Justice, sect. 3; Bl. Comm. vol. i. c. ix. sect. 6; Dalton's Justice of the Peace; 5 Edw. III. c. 14; 7 Ric. II. c. 5; 12 Ric. II. c. 7; 15 Ric. II. c. 6; 11 Hen. VII. c. 2; 19 Hen. VII. c. 12; 22 Hen. VIII. c. 12; 27 Hen. VIII. c. 25; 3 & 4 Edw. VI. c. 16; 2 & 3 Philip and Mary, c. 5; 5 Eliz. c. 3; 18 Eliz. c. 3; 39 Eliz. c. 3; 43 Eliz. c. 2; 3 Car. I.

c. 4; see Castle, pp. 1—78. See too for the statutes dealing with the subject, and for a digest of the decisions thereon, Chambers' Law relating to Rates and Rating, 2nd ed.

² *Ipswich Dock Commissioners v. St. Peter's, Ipswich*, 7 B. & S. 310.

³ *Trustees of Duke of Bridgewater v. Surveyors of Highways for Bootle-cum-Linacre*, 7 B. & S. 348. See *ante*, pp. 13, 15, 76.

⁴ *Ipswich Dock Commissioners v. St. Peter's, Ipswich*, *supra*.

Parish extending along the shores of a river.

Where, in beating the boundaries of the parish of Rotherhithe, it was shown that the authorities proceed along the embankments, wharves, or other shore of the river, while in the adjoining parish of Bermondsey the authorities go along the middle of the river; and that the parish of Rotherhithe has never done or exercised any parochial act or authority beyond the embankments, &c.—it was held, that the inference from the above circumstances was that the parish of Rotherhithe extended to the middle of the river, and that, therefore, a pier built on piles in the bed of the river opposite one of the embankments, but not connected with it, was rateable to the poor rate of the parish.¹

Land covered with water.

By sect. 55 of *The Local Government Act, 1858*, “the occupier of any land covered with water, or used only as a canal or “towing-path for the same or as a railway constructed under the “powers of any Act of Parliament for public conveyance,” is to be assessed to the district rate at one-fourth only of the net annual value as ascertained by the last poor rate. It has been held that a wet dock was “land covered with water” within this provision; and that a railway which had been constructed by a dock company in connection with their docks and joining a public railway and canal under the powers of their private Act, by which the company were bound to complete the railway for the use of the public on the payment of tolls, was a railway within the provision, although it was not constructed to carry passengers, but that warehouses and other adjuncts to docks are rateable at the net annual value.² An artificial reservoir is “land covered “with water” under the section.³

Piers.

Where two companies, incorporated under *The Companies Act, 1864*, received tolls for the use of a pier which extended from the shore into the sea for several feet below low water mark, being constructed of a wooden deck resting on iron piles driven into the sands, so that the water flowed under it, and no alteration was made in the line of low water mark; it was held, that the part of the pier below low water mark, being beyond the realm, was not extra-parochial within the meaning of 31 & 32 Vict. c. 122, s. 27, and, as such, annexed to any other parish, nor

¹ *McCannon v. Sinclair*, 28 L. J., M. C. 247; 2 E. & E. 53; 33 L. T., O. S. 226.

² *Reg. v. Newport*, 31 L. J., M. C.

267; 6 L. T. 456.

³ *Hampton Urban District Council v. Southwark and Vauxhall Water Co.*, (1900) A. C. 3, H. L. (E.).

was it an accretion from the sea, and that, therefore, that section did not enable it to be rated.¹

By an Act of Parliament, certain commissioners were appointed for effecting improvements in the harbour of S. They were authorized and required to deepen and cleanse the channel of the harbour, and to make an artificial entrance with piers, by which ships might pass from the sea into the harbour. Tolls were to be paid in respect of such vessels as entered the harbour, but were not to be received by the appellants to the full amount authorized by the Act, until the whole works were completed. The piers were erected, and the channel deepened and cleansed, and the commissioners received tolls in respect of the vessels which entered the harbour. There was nothing in the Act to show that they were to be considered as purchasers or owners of the land upon which the works were to be done:—Held, first, as to the channel, that the commissioners had simply a power to make a right of passage from the sea to the harbour, and that they were not rateable to the poor rates in respect of such right of passage; secondly, that although they were occupiers of the land upon which the piers stood, yet that the occupation could not be taken to be enhanced in value by the revenue derived from the tolls, inasmuch as an occupier of the piers would get no part of the tolls, or derive any benefit² from the harbour; and, therefore, that the appellants were not liable to be rated to the poor rates, the piers themselves being worth nothing.³ Where

¹ *Blackpool Pier Co. v. Fylde Union*, 46 L. J., M. C. 189; 36 L. T. 251; 41 J. P. 344. Sect. 27 of 31 & 32 Vict. c. 122, is as follows:—"From the 25th day of December next, every place which was or is reputed to be extra-parochial, whether entered by name in the report upon the census for the year 1851, or not, for which an overseer has not been then appointed, or for which no overseer shall then be acting, or which has not been then annexed or incorporated with the next adjoining parish, shall, for all civil and parochial purposes, be annexed to and incorporated with the next adjoining parish with which it has the largest common boundary; and in case there shall be two or more parishes, with which it shall have boundaries of equal extent, then with that parish which now contains the lowest amount of rateable value; and every accumulation from the sea, whether natural or

artificial, and the part of the sea shore to the low water mark and the bank of every river to the middle of the stream, which on the said 25th day of December next shall not be included within the boundaries of, or annexed to and incorporated with, any parish, shall, for the same purpose be annexed to and incorporated with the parish to which such accretion part or bank adjoins, in proportion to the extent of the common boundary." See remarks of Lord Coleridge, C. J., on the construction of this section; 46 L. J., M. C. 191.

² As to "beneficial occupation" see *London County Council v. Brith Overseers*, (1893) A. C. 562.

³ *New Shoreham Harbour Commissioners v. Lancing*, 39 L. J., M. C. 121; L. R., 5 Q. B. 489; 22 L. T. 434; *Lewis v. Swansea Overseers*, 5 El. & Bl. 500; 25 L. J., M. C. 33; 1 Jur., N. S. 1108.

commissioners were empowered by Act of Parliament to improve the navigation of a harbour, the soil of which was not vested in them, and were authorized to demand and receive certain "harbour dues" for every vessel clearing the harbour, and also certain "goods dues" on all wares, merchandise, &c., shipped or unshipped, within it, and such dues were greatly augmented by facilities provided on certain pieces of land conveyed to them for quays and mooring places; it was held that as they received the dues by reason of statutory rights independent of their right to the quays, the receipt did not affect the rateable value of the quays.¹

Wet docks.

By sect. 33 of 3 & 4 Will. IV. c. 90,² the owners and occupiers of houses, buildings, and property, other than land rateable to the relief of the poor, shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of the Act. It has been held,³ where certain appellants were the occupiers of certain docks, covering an area of 165 acres, 95 of which formed a wet dock or tidal basin, that this dock or basin was property *ejusdem generis* with the houses and buildings mentioned in the Act, and, therefore, that the appellants were rateable at the higher amount.

Profits of docks must be rated where they are earned.

Profits, if rated at all, must be rated where they are earned.⁴ In *Reg. v. Bristol Dock Co.*⁵ it was held that no portion of the dues payable by ships on entering the port was a profit arising from a new basin, and that the basin was rateable to the relief of the poor as ordinary land, and not in respect of such dues;⁶ and in *Reg. v. Hull Dock Co.*,⁷ where the company constructed a harbour and docks, but had no property in the harbour, though the soil of the docks was vested in them, and were empowered to take toll on all vessels, whether they used the docks or not,

Reg. v. Hull Dock Co.

¹ *Blyth Harbour Commissioners v. Newsham and South Blyth Overseers*, 63 L. J., M. C. 274; (1894) 2 Q. B. 675; 9 R. 618; 71 L. T. 34; 59 J. P. 4, C. A.

² The Watching and Lighting Act.

³ *Peto v. West Ham*, 28 L. J., N. S., M. C. 240; 2 E. & E. 144; per Lord Campbell, C. J., Wightman, J., and Crompton, J.; Erle, J., holding that they were rateable at the lower amount, as the area of ninety-five acres was land. Cf. *Berwick Harbour Commissioners v. Tweedmouth Churchwardens*, 34 L. T. 159; 5 Asp., M. C. 532.

⁴ *Reg. v. Bristol Dock Co.*, 10 L. J.,

M. C. 105; see Castle, p. 306; cf. *Reg. v. Hull Dock Co.*, 7 T. R. 219; *Reg. v. Hull Dock Co.*, 5 M. & S. 394.

⁵ 10 L. J., M. C. 105; 1 Q. B. 335; 1 G. & D. 76.

⁶ See judgment of Lord Denman, C. J., and the cases there cited, 10 L. J., M. C. 111.

⁷ 14 L. J., M. C. 114; 7 Q. B. 2; 9 J. P. 405; cf. *Reg. v. Dock Company of Hull*, 1 T. R. 219; *Reg. v. Hull Dock Co.*, 5 M. & S. 394; and *Berwick Assessment Committee v. Tweedmouth*, 54 L. T. 159; 5 Asp., M. C. 532; 51 L. J., M. C. 84.

coming into the harbour, the Court held that they were rateable only for such dues as were paid by ships using the docks. "As to those ships which do not come into the docks," said Lord Denman, C. J., "and which never are on the property of the company at all, the case is very different. The toll given to the company, and which such ships are obliged to pay, is doubtless given in respect of the company having made those docks, but still it does not arise from the use of the docks, nor is it earned in them. It is a naked toll, just as much as toll paid by vessels passing lighthouses in similar cases."

The view of the law taken in these cases has, however, been modified by subsequent decisions, and railways and other properties are now habitually rated parochially for earnings collected elsewhere.¹

In the case of *The Mersey Docks and Harbour Board v. Overseers of Liverpool*,² the appellants occupied docks in several parishes and townships on the Lancashire and Cheshire sides of the Mersey, which they held and administered under their Act of Parliament as one estate, the docks on the Lancashire side of the Mersey being by far the most profitable part of the undertaking, which was carried on at a loss on the Cheshire side of the river. The appellants had been rated by the parish of Liverpool on the principle of ascertaining the net income of the docks, &c. locally situated within the parish of Liverpool, without taking into account the profits of the whole undertaking, and it was held, that the parochial principle must always, except in cases of insuperable difficulty,³ be preferred; that no such difficulty was shown in the present case, and that the assessment was accordingly right. This decision was approved in the recent case of *Sulcoates Union v. Hull Dock Co.*,⁴ in which it was held, that in assessing to the poor rate docks extending over more than one parish, the rateable value should, wherever it is possible,⁵ be ascertained by attributing to each parish the receipts earned and the expenses incurred in that parish, and not by obtaining a rateable value for the whole of the docks and then allocating this

Mersey Docks v. Overseers of Liverpool.

Apportionment of earnings of docks.

¹ Castle's Law of Rating, pp. 304, 308.

² 41 L. J., M. C. 161; L. R., 7 Q. B. 643; 26 L. T., N. S. 868; 37 J. P. 165.

³ As in *The Queen v. Kingston-upon-Hull Dock Co.*, 21 L. J., M. C. 155; 18 Q. B. Rep. 325.

⁴ (1895) A. C. 136; 64 L. J., M. C. 49;

71 L. T. 642; 59 J. P. 612, H. L. (E.).

⁵ Cf. as to this the remarks of Lord Herschell, (1895) A. C., at pp. 144—145, on the distinction between *Reg. v. Hull Dock Co.*, 18 Q. B. 325, and *Mersey Docks v. Liverpool*, L. R., 7 Q. B. 643; Castle, 3rd ed. p. 310.

value to each parish in proportion to the water area of the docks in that parish.

The occupiers of property capable of beneficial occupation are liable to be rated in respect of its full rateable value, without regard to the amount of benefit which they themselves derive from that occupation.¹ The true test of beneficial occupation is not, however, whether a profit can be made, but whether the occupation is of value.² Where railway and tramway lines formed part of a dock system, but the dock company were prohibited by statute from taking any tolls for the use of the lines, it was held, that as the dock company were prevented from earning rent because of the statutory prohibition, the rent which could have been earned but for prohibition ought not to be taken into consideration in determining the value of their property.³ In *Reg. v. Southampton Dock Co.*,⁴ the premises of the company consisted in part of the custom house, rented and occupied by Her Majesty's commissioners of customs, and a manufactory and several workshops, rented and occupied by the West India Mail Packet Company and J. W., and it was held that sect. 25 of 13 *Geo. III.* c. 50,⁵ which provided that every person, whether landlord or tenant, who should let out his house in separate apartments or ready furnished to lodgers, should for the purposes of the Act be deemed the occupier and liable to be rated, did not apply to the part of the company's premises of which they were not the occupiers.

Allan v. Overseers of Liverpool, and *Inman v. Overseers of Kirkdale*,⁶ raised the question as to whether certain persons were rateable as occupiers through the fact that the Mersey Dock and Harbour Board, under the powers of their Act, appropriated certain accommodation in the docks for their use, in the first case certain berths for the use of steamers with sheds attached, and in the other a certain space as a coal dépôt; and it was held, that the board had not parted with the occupation of any part of

¹ *Reg. v. Rhymney Rly. Co.*, 10 B. & S. 198; 35 L. J., M. C. 75; L. R., 4 Q. B. 276; *Mersey Docks and Harbour Board v. Birkenhead*, L. R., 8 Q. B. 445; 42 L. J., M. C. 141; 29 L. T. 454; 21 W. R. 913.

² *London County Council v. Erith Overseers*, (1893) A. C. 562; *Reg. v. School Board for London*, 17 Q. B. D. 738; *Burton-on-Trent Corporation v. Churchwardens of Egginton*, 24 Q. B. D. 197.

³ *Sulcoates Union v. Hull Dock Co.*, (1895) A. C. 136; 64 L. J., M. C. 49; 71 L. T. 642; 43 W. R. 623; cf. *Sutton Harbour v. Plymouth Union*, 63 L. T. 772; 55 J. P. 232.

⁴ 20 L. J., M. C. 155; 14 Q. B. 587.

⁵ "An Act for the better regulating the poor, &c., of Southampton."

⁶ 43 L. J., M. C. 69; L. R., 9 Q. B. 180; 30 L. T. 93; 38 J. P. 260.

such sheds so as to render the appellants rateable in respect of such occupation.

Dockyards in the occupation of the Crown, or occupied for Government purposes, are exempted from the payment of rates, but tenants of the Crown holding for their private benefit are rateable; and it has been held, that the Crown not being named in 43 *Eliz. c. 2*, property in the occupation of the Crown or of persons using it exclusively in or for the service of the Crown is not rateable to the relief of the poor.¹

Exemption of the Crown from rates.

The Mersey Dock cases.

Various deductions have been allowed by the Courts with respect to the assessment of docks.

Deductions allowable in the assessment of docks.

A dock company empowered by their Act to build or provide out of their income steam-tugs for towing vessels into or out of the docks from or to Southampton or to any part of the British Channel, had in use a steam-tug which offered considerable advantages, though it was not indispensable, to those who used the docks, and was conducive to the general profits of the dock business; and attached to the freehold and essential to the business of the company was a certain fixed plant, consisting of cranes, steam engines, derricks, and other ponderous machinery, which, however, were capable of being detached as easily and with as little injury to the freehold as tenants' fixtures put up for the purposes of trade and business, and usually valued as between incoming and outgoing tenants. Held, that the steam-tug must be taken as ancillary to the docks, and a part of the floating capital, and that the expense of it was a proper deduction to be made in estimating the amount of the company's assessment to the rate; but that the cranes and other ponderous machinery were properly included in estimating the rateable value of the company's premises.²

Where, however, a steamboat was used for towing barges filled with mud out to sea and back, a deduction of 1,200*l.* therefor (under the head of movable plant) was disallowed while the boat was used only for the purpose of constructing the dock; though it was held that it would be permissible in future rates if the boat became necessary for permanent use in removing silt.³

It was also held in *Reg. v. Southampton Docks*⁴ that as an

¹ *Jones v. Mersey Dock and Harbour Board, Mersey Dock and Harbour Board v. Cameron*, 11 H. L. Cas. 443; 35 L. J., M. C. 1; Castle, p. 12.

² *Reg. v. Southampton Dock Co.*, 20

L. J., M. C. 155; 14 Q. B. 587.

³ *Reg. v. Tyne Improvement Commissioners*, 6 L. T. 489.

⁴ 20 L. J., M. C. 155.

allowance to the directors for management, another proper deduction to be made was a reasonable amount of remuneration for personal trouble and expense, and for the exercise of the skill and judgment of a supposed lessee of the company in managing the affairs of the docks, independently of the profit on capital employed by him; but a similar deduction (under the head of disbursements) of 300*l.* as "allowance for direction" was disallowed in the case of *Reg. v. Tyne Improvement Commissioners*,¹ where the Act under which the commissioners constructed the dock gave them no power to remunerate themselves out of the dock funds for their services. In the latter case deductions of 500*l.* for cash balance (under the head of capital for carrying on the dock), and also 150*l.* for watching by means of a public boat paid for out of other than dock funds, were disallowed; while a deduction in respect of stores in hand was permitted.²

It has been held that no deduction could be made for income tax in respect of the estimated profit of a supposed tenant of the docks, that not being a tax upon the subject-matter rated, but upon the net income of the tenant after paying the rent of the premises;³ and in *Mersey Docks and Harbour Board v. Liverpool Overseers*⁴ the appellants were held not to be entitled to a deduction for tenant's profits in addition to the cost of collecting the rates they were authorized by their Act to charge for the use of their docks.

In ascertaining the net rateable value of the property assessable to the poor rate, an allowance is to be made for rates and taxes, and such allowance ought to be made upon the net rateable value after the rates and taxes themselves, in addition to all other proper allowances, have been deducted.⁵ Property is to be valued *in communibus annis*, that is as it may be considered to exist in ordinary years, and not as it may accidentally happen to be in exceptional years;⁶ and a dock company has been held rateable in respect of tonnage duties received under 14 Geo. III. c. 56, though it appeared that the expenditure in repairs during the period for which the rate was made exceeded the amount of such duties.⁷

¹ 6 L. T. 489.

² *Ibid.*

³ 20 L. J., M. C. 155.

⁴ L. R., 9 Q. B. 84; 43 L. J., M. C. 33; 29 L. T. 454; 38 J. P. 27.

⁵ *Reg. v. Tyne Improvement Commissioners*, 6 L. T. 489; *Tyne Improvement*

Commissioners v. Churchwardens and Overseers of Chirton, 32 L. J., M. C. 192: cf. *Rex v. Hull Dock Co.*, 2 B. & C. 516.

⁶ *Castle*, pp. 159, 160, 164.

⁷ *Rex v. Hull Dock Co.*, 5 M. & S. 394, 400; *Rex v. Mirfield*, 10 East. 219: 25 R. R. 412, 413.

There have been many decisions as to the rateability of bodies, like floating piers or docks, barges, hulks, and the like, which, while not themselves occupying the soil, are either attached to floats, &c. fixed in it, or otherwise kept permanently in the same position; the question being usually whether they are in permanent beneficial occupation of the soil in the parish, and also whether such bodies have increased the rateable value of the occupation of the moorings.¹

Rateability of marine property not actually occupying the soil.

In *Reg. v. Leith*,² a steamboat company were rated in respect of their floating pier or landing-place, by the description of "tenement, land, landing-place and premises, and the brow or "brows, barge or barges, &c., lying upon, fixed to, or connected "with, the same tenement, land, landing-place or premises, and "the easement or easements, anchorage or anchorages, held, "used, or enjoyed therewith," &c. The pier consisted of three floating barges, kept in their places by chain cables fastened to anchors sunk in the bed of the river, and connected by wooden bridges, the first of which rested on the first barge at one end, the other end being fastened to a platform resting upon an abutment made fast to the wall of a building on the shore, the ground floor of which was rented of one J. S. by the company, and formed part of a mill, the residue of which was occupied by J. S., and both bridges and barges rose and fell with the tide. Passengers embarking by the steamboats passed through the ground floor of the building, which floor, as well as the pier and landing-places, were in the exclusive occupation of the steamboat company. It was held, that the rate was laid not on the barges, &c., as distinguished from the land, but on the landing-place and premises together with the floating barges, &c., by which the occupation of the land was rendered more profitable, and was therefore valid; also that the assessment in the rate of J. S. for "the mill and premises, exclusive of the steamboat pier," meant to exclude not the floating barges, but the ground floor and landing-place, and, therefore, that the latter were not twice rated.

Floating piers and floating docks.

Reg. v. Leith.

A floating pier on the Thames, rising and falling with the tide and kept in its place by an iron chain attached to an iron post affixed to landing stairs, and fastened to anchors in the bed of the river by iron chain cables, has also been held rateable to the poor.³

¹ See the remarks of Mr. Castle as to floating bodies, *Law of Rating*, p. 283.

² 21 L. J., M. C. 119; 1 E. & B. 121 18 L. T., O. S. 121; 16 J. P. 310.

³ *Reg. v. Forrest*, 30 L. T., O. S. 284, and cf. *Forrest v. Greenwich Churchwardens*, 8 E. & B. 890; 2 J. P. 130.

In *Reg. v. Morrison*,¹ however, where a ship dock, which floated at high water, and grounded at low water, and was moored by chains to the bed of a tidal navigable river and to a building yard on the bank, the chains being capable of being slackened, to enable the dock to be taken into deeper water, which often occurred, while the harbour-master sometimes removed the dock altogether, Lord Campbell, C. J., distinguishing the case from *Reg. v. Leith*, since the pier was there permanently fixed to the landing-place, held, that the floating dock could not be rated as accessory to the yard.

Similarly, a boat club composed of the members of the University of Oxford were held not to be rateable as the occupiers of a barge floating on the river, and moored, at about thirty feet from the bank, by two iron rings passing loosely round fixed posts in the bed, of such a diameter as to allow the barge to rise and fall with the water of the river.² In the case of *Cory v. Bristowe*,³ however, where the appellants, by permission of the Thames Conservancy, lowered stones and ballast into the river so as to make permanent moorings for certain floating hulks for loading and unloading coal, and paid rent for the accommodation to the conservators, at whose pleasure the moorings were removable at a week's notice, it was held by the House of Lords, affirming the judgment of the Court of Appeal, that the appellants were in the exclusive, permanent and beneficial occupation of the moorings and rateable in respect of the same. In the recent decision of *Tyne Pontoons Co. v. Tynemouth Union*,⁴ the company excavated a creek on land on the tidal portion of the Tyne of which they are occupiers and owners and placed in it two pontoons into which ships could be received for repairing purposes, and which were attached to piles and dolphins by shackles, easily detached, and joined to the land by a movable gangway. The pontoons could be towed out, but had not been moved, except for repairing purposes, for ten and four years respectively, and it was held that they were rightly rateable as being in occupation of the land over which they floated, and also

¹ 22 L. J., M. C. 14; 1 E. & B. 150; 20 L. T., O. S. 190; 17 J. P. 24; cf. Castle, pp. 286, 313.

² *Grant v. Local Board of District of Oxford*, 38 L. J., M. C. 39; L. R., 4 Q. B. 9; 19 L. T. 378; cf. *Watkins v. Assessment Committee of Gravesend and Milton Union*, 37 L. J., M. C. 73; L. R.,

3 Q. B. 350; 18 L. T. 601; 32 J. P. 294; and *Cory v. Churchwardens of Greenwich*, 41 L. J., M. C. 142; L. R., 7 C. P. 499; 27 L. T. 150.

³ 2 App. Cas. 262; 46 L. J., M. C. 273; 36 L. T. 594; 41 J. P. 709.

⁴ 76 L. T. 782; cf. *Reg. v. Morrison* 1 El. & Bl. 450.

that the occupation of the land was enhanced by reason of their being attached and used in connection therewith.

In determining the rateability of certain wharves, it was held in *Reg. v. Doulais Iron Co.*,¹ that certain wharfage dues were to be taken into account in addition to the rent of the wharves themselves.

Wharves.

"Anchorage and beaconage tolls" have been held to be rateable as connected with the use of the soil.²

Anchorage tolls.

The non-rateability of public lighthouses is provided for by sect. 781 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).³ This exemption does not, however, apply to lighthouses belonging to or under the control of private authorities, the occupier of which is rateable in respect of the *annual value* of the *lighthouse machinery, &c.*, but not in respect of the tolls.⁴

Lighthouses and light-house tolls. 57 & 58 Vict. c. 60.

The Mersey Docks and Harbour Board had a statutory right to levy, *inter alia*, light-dues so fixed that, with other receipts applicable to conservancy purposes, the receipts must not exceed the expenditure on those purposes, so that no profit could accrue to the board in respect of the lighthouses, and they owned, as part of their conservancy apparatus, a tower used as a lighthouse, a telegraph station, and houses near the tower inhabited by their lightkeepers and workmen. It was held that the board were not liable to be rated in respect of the tower, inasmuch as its use was so limited by statute that no profit could arise therefrom and there could be no beneficial occupation of it by any tenant; but that they were liable to be rated in respect of the adjoining houses, in estimating the value of which the fact of their proximity to the lighthouse tower ought to be taken into account.⁵

Where rivers have been entrusted by Acts of Parliament to companies or trustees for the purposes of improving the navigation,

Rivers.

¹ 10 B. & S. 208, n.; cf. *Sutton Harbour v. Plymouth Union*, 63 L. T. 772; 55 J. P. 232.

² *Reg. v. Durham, Earl of*, 28 L. J., M. C. 232; 2 E. & E. 230; 1 L. T. 30.

³ This section is as follows:—"All lighthouses, buoys, beacons, and all light dues, and other rates, fees, or payments accruing or forming part of the Mercantile Marine Fund, and all premises or property belonging to or occupied by any of the general light-house authorities or by the Board of Trade, which are used or applied for the purposes of any of the services for which these dues, rates, fees, and payments are received, and all instru-

ments or writings used by or under the direction of any of the general lighthouse authorities or of the Board of Trade in carrying on those services, shall be exempted from all public, parochial and local taxes, dues, and rates of every kind."

⁴ *Reg. v. Rebouce*, Cowp. 583; Cald. 155, 351; *S. C.*, Lofft, 77; Const. 142, pl. 177; Nolan's Poor Law, vol. i. p. 99; cf. *Reg. v. Tynemouth*, 12 East, 46; 11 B. R. 328; *Reg. v. Coke*, 5 B. & C. 797; 29 R. R. 408.

⁵ *Mersey Docks and Harbour Board v. Llanellan (Overseers)*, 54 L. J., Q. B. 49; 14 Q. B. D. 770; 52 L. T. 118; 33 W. R. 97; 49 J. P. 164.

the proprietors have been held not rateable¹ unless the incorporating Act actually vests the soil in them; but in such case they are rateable in a parish through which the navigation passes—though no riverage dues are receivable in the parish—in proportion to their profits upon the whole navigation.² The occupier of a house as surveyor under the trustees of the Lee Navigation has been held liable for poor's rate although by Act of Parliament the tolls are exempted from being rated and the trustees have no beneficial interest but act for the public.³ Where the commissioners of a navigation having borrowed 28,000*l.* on mortgage, and, in virtue of their incorporating Acts, let the navigation for ninety-nine years to a lessee who undertook to make certain advances and to pay the interest of the 28,000*l.*, it was held—on appeal against a rate laid upon the lessee in respect of the navigation—that the interest was in substance a rent, and that the rate ought to be calculated upon it.⁴ In the recent case of *Doncaster Union v. Manchester, Sheffield, and Lincolnshire Railway Co.*⁵ it was held that where the predecessors in title of a railway company were empowered by statute to scour, enlarge, and deepen, and otherwise to improve the navigation of a river, and to make a towing-path, the company are not in occupation of the bed of the river, but have merely an easement; nor is the ownership or exclusive occupation of the towing-path vested in them. They are not, therefore, rateable in respect either of the bed of the river or of the towing-path.

Ferries.

The *lessee and occupier* of an ancient and exclusive ferry, not being an *inhabitant resident* within the township in which one of the termini of the ferry is situated, is *not liable* to be rated there for any share of the tolls of such ferry; for supposing a ferry to be real property, it is not such real property as is mentioned in the statute 43 *Eliz. c. 2*, the occupancy of which subjects the party to the relief of the poor of the place.⁶

¹ *Rex v. Mersey and Irwell Navigation*, 9 B. & C. 95; 32 R. R. 591; *Rex v. Thomas*, 9 B. & C. 114; 32 R. R. 601; *Rex v. Aire and Calder Navigation*, 9 B. & C. 820; 33 R. R. 344; 3 B. & Ad. 139; 37 R. R. 363, 508; *Bruce v. Willis*, 11 A. & E. 463; 9 L. J., M. C. 43.

² *Rex v. Portmore (Earl)*, 1 D. & R. 422; 1 B. & C. 551; 25 R. R. 505.

³ — *v. Armstrong and others*, 2 Stark. 543.

⁴ *Rex v. Chaplin*, 1 B. & Ad. 926; 9 L. J. (O. S.), M. C. 121.

⁵ 71 L. T. 585, H. L. (E.); 6 R. 280: see judgment of Lord Herschell, L. C., 6 R., pp. 282—284, and cf. *Manchester, Sheffield, and Lincolnshire Rly. Co. v. Doncaster Union*, 69 L. T. 350; 57 J. P. 792; *Rex v. Mersey and Irwell Navigation Co.*, 9 B. & C. 95; 32 R. R. 591; *Badger v. S. Yorkshire Railway and River Don Navigation*, 1 El. & El. 347; 28 L. J., Q. B. 188; *Bruce v. Willis*, 11 A. & E. 463.

⁶ *Rex v. Nicholson*, 12 East, 330; 11 R. R. 392.

So, too, the owner of a ferry residing in a different parish, but taking the profits of the ferry on the spot by his servants and agents, has been held *not* rateable for such tolls in the parish where they were so collected, and where one of the termini of the ferry was situated, and on which shore the ferry boats were secured by means of a post in the ground—the soil itself at the landing-places being the king's common highway, and the owner of the ferry having no property in or exclusive possession of it.¹

In *Reg. v. North and South Shields Ferry Company*,² where a company was authorized³ to maintain a ferry across the Tyne, and to erect ferry houses, landing-places, &c. on either side and were rated to the poor on the north side, as occupiers of a “ferry “landing and tolls,” in a sum including half the net value of the tolls, it was held that the tolls could not be rated directly as being connected with real property occupied in the township, and thus ceasing to be incorporeal, or indirectly as profits of land; but that the land should not be rated at its value as land merely, but on an estimate of the rent from its being available for earning tolls, and also that the rateable value could not be ascertained by dividing the profits in proportion of the land occupied in the two townships, and the length of transit.⁴

Reg. v. North and South Shields Ferry Co.

The right of fishery was not formerly rateable at common law, unless connected with the use of the land;⁵ but now, by 37 & 38 *Vict. c. 54*,⁶ s. 6, it is enacted as follows:—

Fisheries.

1. Where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of *fishing* (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the

¹ *Williams v. Jones*, 12 East, 346; 11 R. R. 411; and cf. judgment of Lord Ellenborough in *Rex v. Nicholson*, 12 East, 341; 11 R. R. 398.

² 1 E. & B. 140; 22 L. J., M. C. 9; 7 Rail. Cas. 849; 20 L. T., O. S. 89; 17 J. P. 21.

³ By 10 Geo. IV. c. 98.

⁴ Cf. as to ferries, Castle, pp. 293—297. Mr. Castle remarks that “in all these cases of ferries, the passengers, &c., appear to have been carried in boats worked by wind or steam, or by hand freely over the surface of the water. The cases where the ferry is worked by means of ropes or chains lying on the bed of the river, do not

“seem to have been brought before the Court. The distinction between the two seems to be similar to that between a carriage driving freely over a road, and a tramway car that travels along the rails laid down for that particular purpose; if this be so, the question of the rateability of a ferry so worked would probably be decided upon the same principle as the tramway cases:” p. 296.

⁵ See Castle, pp. 3, 491, 492; *Rex v. Ellis*, 1 M. & S. 652.

⁶ An Act to amend the law respecting the liability and valuation of certain property for the purposes of rates.

gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase.

2. Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

3. Subject to the foregoing provisions of this section, the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

4. For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

In *Reg. v. Smith*,¹ commissioners were empowered by a local fishery Act, passed for the preservation and increase of salmon, to raise a rate from every owner of a fishery in a large district for the purposes of the Act. The appellant was tenant of a fishery, for which he paid a rent of 305*l.*, and a rate of 6*l.* to the commissioners; and it was held that in ascertaining the rateable value of his property, the amount of the rate should be deducted, for that it was an "expense necessary to maintain the "property in a state to command such rent," and so allowed to be deducted under sect. 1 of the Parochial Assessment Act, 1834.

Canals.
Exemption of
in certain
cases.

A canal company is rateable in each and every parish through which its canal passes as an occupier of land covered with water.²

Certain Canal Acts, passed at the time when such undertakings were chiefly begun, contained provisions partially exempting such canals, in so far that they made "the rateability of the lands "taken for the canal independent of the profits of the under- "taking generally, by enacting that such lands are to be rated

¹ 55 L. J., M. C. 49; 54 L. T. 431; 50 J. P. 215.

² *Reg. v. Trent and Mersey Canal*, 21 L. & R. 752; 1 B. & C. 545.

"as other lands in the parish."¹ And hence it was held, that companies so exempted were not liable to be rated for the land used for the purposes of the canal according to its improved value, but in the same proportion as other lands lying near should be rated, and as the same lands would be rateable in case the same were the property of individuals in their natural capacity.²

With regard to the question of the value of "the other lands" "lying round," it was decided in *Rex v. Monmouthshire Canal Co.*,³ that the canal was to be rated at the value which the adjacent lands bore at the time of the rate, and not at their value at the commencement of the undertaking, nor at that which they would have borne at the time if the canal had not been made, and their value thus considerably increased.

Value of adjoining lands, how far to be considered.

In ascertaining the value of adjoining lands, where such land has been covered for the most part with buildings, it was held by Lord Ellenborough in *Rex v. Grand Junction Canal*,⁴ and Lord Campbell and Erle, J., in *Reg. v. Grand Junction Canal*,⁵ that the land should be rated as other lands would be, supposing them not to be applied to the purposes of the canal, but to have remained in the hands of individual farmers for ordinary agricultural purposes. On the other hand, it was laid down by Cockburn, C. J. in *Reg. v. Glamorganshire Canal*,⁶ that the true criterion is what a tenant from year to year would give for the adjoining land increased in value by buildings, together with the adjoining lands of other descriptions, the different lands being brought into hotchpot, so that the canal would be rated according to the aggregate value of the adjoining lands at the time the rate was made⁷; but in the cases of *Grand Junction Canal Co. v. Hemel Hempstead*, and *Grand Junction Canal Co. v. King's Langley*,⁸ the Court of Queen's Bench followed the opinion of

¹ *Rex v. St. Peter the Great*, 5 B. & C. 473; *The King v. Regent's Canal*, 6 B. & C. 720; *Rex v. Chelmer and Blackwater Navigation*, 2 B. & Ald. 14; 36 R. R. 447; *Rex v. Oxford Navigation Co.*, 6 D. & R. 86; 28 R. R. 216; 36 L. J., O. S., K. B. 168; *Rex v. Trent and Mersey Canal*, 2 D. & R. 752; 1 B. & C. 545; *Rex v. Grand Junction Canal*, 1 B. & Ald. 289; 19 R. R. 316; Castle, pp. 219, 220.

² *Regent's Canal v. Hendon Overseers*,

6 El. & Bl. 852; 3 Jur., N. S. 208.

³ 3 A. & E. 619.

⁴ 1 B. & Ald. 289; 19 R. R. 316.

⁵ 7 W. R. 597.

⁶ 3 E. & E. 186; 29 L. J., M. C. 238.

⁷ See Castle, pp. 221—224.

⁸ L. R., 6 Q. B. 173; 40 L. J., M. C. 25; 24 L. T. 228; cf. *Rex v. Dudley Canal Co.*, 7 D. & R. 66; *Warwick and Birmingham Canal Co. v. Birmingham Union*, 27 L. T. 487.

*Regent's
Canal v. St.
Pancras.*

Lord Campbell, and the same principle was affirmed in the more recent case of *Regent's Canal Co. v. St. Pancras Assessment Committee*.¹ There the Canal Company's Act provided that the lands of the company, whether covered with water or not, and also all dwelling-houses, wharves, warehouses, lock-houses, and other houses of the company, should be rateable—the lands according to their quantity and quality, and the dwelling-houses, &c., according to the nature and respective uses, dimensions, and descriptions thereof; and should be charged and assessed in like manner as lands of a like quality, and dwelling-houses, &c., of a like and similar size, nature, dimension or description in the respective parishes where the same should be situate, were, or should be, assessed or charged. The lands adjoining the canal were all built upon, and the assessment committee assumed the area occupied by the canal and towing-path to be covered by buildings similar in rateable value to the buildings adjoining the canal, allowing for necessary roads, access, &c., and then took a proportionate part of such rateable value as representing the rateable value of the lands so covered as distinguished from the buildings, but it was held, that the canal ought to be rated in like manner as land of the like quality in the parish uncovered with buildings, the value of which might be increased from time to time by circumstances.

By sect. 33 of 3 & 4 Wm. IV. c. 90, the owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any parish, shall be rated at, and pay a rate, in the pound three times greater than that which the owners and occupiers of land shall be rated at and pay for the purposes of this Act. In *Reg. v. Neath Canal Co.*² the appellants were possessed of a canal and towing-path, bridges, and a dry dock, lined with masonry, used for repairing the canal boats, and it was held that "property" meant things *ejusdem generis* with houses and buildings, and did not include a canal and towing-path; that the bridges and dry dock were accessories to the canal, and must be considered part thereof; and that the whole ought to be rated as land.

Canal tolls
were ori-
ginally held

It was formerly held, that canal tolls were rateable *per se*, and not as part of the profits arising from the occupation of the

¹ 3 Q. B. D. 73; 47 L. J., M. C. 375; 19 L. T. 311.

37 L. T. 637; cf. *Birmingham Canal Navigation v. Birmingham Overseers*, ² L. R. 6 Q. B. 707; 40 L. J., M. C. 193.

soil, and, therefore, were rateable in the parish where they became due, that is, where the voyage terminated.¹ rateable
per se;

This rule was, however, completely reversed by the case of *Rex v. Nicholson*,² above mentioned, where it was decided that tolls detached altogether from local real property are not rateable *per se*. In *Rex v. Milton*,³ where certain tonnage dues were payable in respect of goods carried along a line of river navigation, extending through several parishes, which were landed at a wharf locally situate within the parish of B.; it was held that a rate on the proprietor of those dues for their whole amount in the parish of B., stated to be for river tonnage, could not be considered as a rate upon that part of the river locally situate within the parish of B., but as a rate upon the parts of the river situate as well within as without the parish, and that it could not therefore be supported. but now are
not so rate-
able since.

These decisions in *Rex v. Nicholson* and *Rex v. Milton* were confirmed by *Rex v. Palmer*,⁴ which decided that the proprietors of an inland navigation are rateable to the relief of the poor in every parish through which the navigation passes, as occupiers of the land situate in each parish used for the purposes of the navigation; and, therefore, that where the proprietors of such a navigation which extended through different parishes, were rated in one for the entire amount of their tolls, the rate could not be supported.

The principles here laid down now appear to apply equally to cases where the payments are made irrespective of distance.⁵

Where a canal runs through several parishes, a rate in one should be in proportion to the earnings in that parish, not in proportion to the length of the canal there.⁶

The proprietors of a canal navigation are in general, and where there is no Act of Parliament directing otherwise, to be

¹ *Rex v. Cardington*, 12 Cowp. 581; *Rex v. Page*, 4 T. R. 543; 2 R. R. 454; 1 Nolan's Poor, p. 107, S. C.; *Rex v. Aire and Calder Navigation*, 2 T. R. 660; 1 R. R. 579; *Rex v. Staffordshire and Worcestershire Canal*, 8 T. R. 340; 4 R. R. 683; *Rex v. Leeds and Liverpool Canal*, 5 East, 325; *Rex v. St. Mary's, Leicester*, 6 M. & S. 400; 36 R. R. 452; *Rex v. Calder and Hebble Navigation Co.*, 1 B. & Ald. 263; cf. Woolrych, Law of Water, p. 329; Castle, Law of Rating, pp. 205 *et seq.*

² 12 East, 330; 11 R. R. 398; see *ante*, p. 606.

³ 3 B. & Ald. 112; 22 R. R. 317; cf. *Rex v. Calder and Hebble Navigation*, 1 B. & Ald. 263. It was also held that 41 Geo. III. c. 23, s. 1, does not give the Court of King's Bench the power of amending a poor rate.

⁴ 1 B. & C. 546; 25 R. R. 502.

⁵ See Castle, Law of Rating, pp. 214, 216; *Rex v. Oxford Canal*, 4 B. & C. 74; 28 R. R. 216; *Rex v. Oxford Canal*, 10 B. & C. 113; *Reg. v. Kingwinford*, 7 B. & C. 236; 31 R. R. 181.

⁶ *Rex v. Chaplin*, 1 B. & A. 926; 9 L. J., O. S., M. C. 12.

rated in proportion to the profits derived from the use of that part of the canal situate within the parish for which the rate is imposed.¹

Lock dues.

In *Rex v. Cardington*,² mentioned above, the grantee of the right of navigation of the River Ouse between Erith and Bedford, was held rateable to the poor in the parish of Cardington, in respect of the tolls arising from a sluice erected there, though he himself resided elsewhere, and the tolls were collected in another parish. Commenting on this case in *Rex v. Nicholson*,³ Lord Ellenborough said: "The rate was specifically upon the sluices, on that which was local and visible property, and producing profit within the parish; and all the cases where tolls have been held rateable, when they are examined, will be found to have proceeded on that ground."

This principle appears to hold good with regard to lock dues which have been decided "to be a local earning, and to be locally rateable."⁴

In *Rex v. Macdonald*,⁵ this question came under consideration. Where an Act of Parliament empowered the Duke of Bridgewater to erect a lock upon the Rochdale Canal, and to receive at such lock certain rates or tolls upon goods in vessels navigated from that canal into his own, as a compensation for the profits arising to him from certain wharves at Manchester, which were sacrificed for the public benefit in that navigation, it was held that a poor's rate on his trustees and occupiers of the "Rochdale canal, lock, tunnel dues or rates" (which rates or dues are only other names for the lock rated therewith) is good, though the trustees were found not to be inhabitants of the township for which the rate was made.

A more recent decision is that of *Rex v. Lower Mitton*,⁶ where lock dues were expressly held locally rateable. There a canal company were empowered by their Act to take lock dues at two of their locks in lieu of making a mileage charge, as they were entitled to, of 11½d. a ton; and the Court held, that the annual profits of the locks were to be considered for the purposes of the poor rate to have been produced in that parish where the locks

¹ *Rex v. Dudley Canal Navigation Proprietors*, 1 M. & Ry. 20; 9 B. & C. 810; 8 L. J., O. S., M. C. 57.

² 2 Cowp. 581.

³ 12 East, 341; 11 R. R. 398.

⁴ See Castle, pp. 215—217.

⁵ 12 East, 324; 11 R. R. 396.

⁶ 9 B. & C. 810; 4 M. & R. 711; 33 R. R. 337.

were situate, and not in the several parishes through which the canal passed.

“Trade profits,” says Mr. Castle,¹ “unlike stock-in-trade, Trade profits.
“never were rateable *per se*, even where personal property was
“rated. But in the valuation of property, its capability for
“earning profits of trade is an element of value that can
“never be entirely eliminated: . . . hence when they
“improve the value of the occupation they must be taken into
“account.”

The trade profits of a canal company arise from their duties as carriers. In *Rex v. Trustees of Duke of Bridgewater*,² it was held that the proprietors of a canal were rateable for the sum at which it would let, and not for their gross receipts *minus* their expenses. “I lay out of consideration,” said Bayley, J., “the fact of the trustees being carriers, because their occupation only is to be considered. The profits of carrying goods are the profits of their trade. The tonnage is the profit of the land occupied by them. The other sums received by them constitute the profits of their trade.”

With regard to deductions, it may be noted that while the expenses of collecting tolls, of repairs of banks, and of supplying water (“all expenses incurred in repairing that part of the canal in that parish”), must be deducted from the sum paid for poor rate,³ on the other hand, it has been held by Lord Campbell, C. J., in *Reg. v. Corentry Canal*,⁴ that the expenses of maintaining locks do not come under the head of local expenses.

Where there is a profitable occupation of a public highway by private persons or companies, the occupiers are rateable, though they have no property in the soil. But where a profit is made, it is not rateable unless it is an incident of the occupation of land, even if the person receiving such profit is the owner of the soil. Water companies

Hence water companies are rateable for the land occupied by rateable for land occupied

¹ Page 460, cf. 1st Ed., p. 400. He points out that canals differ from railways on this point, in that the latter have a monopoly of carrying traffic, while the former have to compete with the public. Cf. *Reg. v. Lapley Overseers*, 9 B. & S. 568.

² 9 B. & C. 68; 7 L. J., O. S., M. C. 81; 32 R. R. 574.

³ *Rex v. Oxford Canal*, 10 B. & C. 163; 5 M. & R. 100.

⁴ 1 E. & E. 572; 28 L. J., M. C. 102. In contradiction apparently to *Rex v. Lower Mitton*, 9 B. & C. 68; 33 R. R. 337; and *Rex v. Macdonald*, 12 East, 324; 11 R. R. 396; cf. on the subject, Castle, pp. 172—177.

by their works, &c.

their pipes, mains,¹ and reservoirs,² and the Metropolitan Board of Works were held rateable for their engine-houses, pumping stations, and wharves, though not for their sewers, which are not the subject of beneficial occupation.³

In *Reg. v. South Staffordshire Waterworks Co.*⁴ a waterworks company had works extending over many parishes. All the works were in use for the supply of their customers, but they were in excess of the existing requirements of the company, and were created for and adapted to an increased supply in future years. In the calculation by which the rateable value of the mains and service pipes in one of the parishes supplied was to be arrived at, it was held that the whole of the works being used for the purpose of distributing water as a source of profit, the whole of the capital expenditure must be taken into account, and not merely so much as would have sufficed to provide the existing supply; and also that the deduction to be made in respect of the rates which the hypothetical tenant would have to pay, is the amount of the rates that would be payable on the sum at which the works ought to be assessed, and not necessarily the rates based on the existing valuation list.

In *Talargoch Mining Co. v. St. Asaph Union*,⁵ where the owners of a lead mine diverted a stream from its natural course into an artificial watercourse passing to the machinery connected with the mine, paying the owners of the stream for its diversion, and paying small sums for the occupation of the land; it was held that they were rateable in respect of the occupation of the watercourse at the full value of the land enhanced by its capacity for carrying water, and that the stream was not exempt by its connection with a lead mine, which is not rateable under 43 *Eliz. c. 2*.

¹ *Atkins v. Daris*, Cald. 325; *Reg. v. Bath*, 14 East, 609; 13 R. R. 333; *Reg. v. Chelsea Waterworks*, 5 B. & Ald. 156; 2 L. J., M. C. 98; 39 R. R. 438; *Reg. v. Rochdale Waterworks*, 1 M. & S. 634; *Reg. v. West Middlesex Waterworks*, 1 E. & E. 716; 20 L. J., M. C. 135; cf. *Castle*, pp. 337—339.

² *Reg. v. Bath*, 14 East, 609; 13 R. R. 333.

³ L. R., 4 Q. B. 15; 9 B. & S. 937; 38 L. J., M. C. 24; *New River Co. v. St. Pancras Vestry*, 45 J. P. 75; *Reg. v. Holme Reservoirs Directors*, 10 W. R. 734; *Sheffield United Gaslight Co. v. Sheffield Overseers*, 4 B. & S. 135; 32 L. J., M. C. 169; 8 L. T. 692.

⁴ 16 Q. B. D. 359; 55 L. J., M. C. 88; 54 L. T. 782; 50 J. P. 20, C. A.

⁵ L. R., 3 Q. B. 478; 9 B. & S. 210; 37 L. J., M. C. 149; cf. *Reg. v. Bilston*, 5 B. & C. 851, where the owner and occupier of an ironstone mine, who erected an engine for the purpose of drawing the water from the mine, using it for no other purpose, was held *not* rateable for the engine.

Reg. v. Bilston seems to be much questioned; see *Talargoch Mining Company v. St. Asaph Union*, L. R., 3 Q. B. 478; and *Reg. v. Metropolitan Board of Works*, L. R., 3 Q. B. 15; see *Castle*, p. 437.

Land, the value of which is exhanched by a spring, has been held rateable to the poor at such improved value, although the New River Company, the owners and occupiers of the spring, received none of the profits in the parish, nor did any part of such profits become due in the parish where the land lay.¹ Bayley, J., said: "I think it is clear that the company are liable "to be rated for the spring, which is part of the produce of the "land. The company have the means of carrying this produce "to market, where it affords a beneficial return."

Value of land enhanced by a spring.

The question of the mode of rating a whole system of water-works extending through several parishes was raised in *Rex v. Bath*,² where the corporation were held liable to be rated for the springs, and for the reservoirs made by them in the parishes of Lydcomb and Widcomb, as for land occupied by them, which reservoirs, by means of aqueducts and pipes laid underground, partly in the same parish and through the three adjacent parishes for the supply of the city, produced a clear annual profit of 600*l.*; but not for the whole of the entire profit in the first-mentioned parish, in which the springs were first collected into the reservoirs, a proportion of such entire profit accruing to them from the underground aqueducts and pipes laid into the soil of the other parishes, in respect of which they were to be considered as occupiers of land yielding annual profit in these parishes.

Where works extend through several parishes.

This point appears to have been satisfactorily settled by the case of *Reg. v. Mile End Old Town*,³ where the works of a water company extended into several parishes, and consisted of two portions, one of which, being the service pipes which delivered the water to the consumer, was directly productive of profit; and the other, consisting of reservoirs, buildings, &c., indirectly conduced to such production. In some parishes the company had no works, but service pipes, and it was held that the rateable value of the reservoirs, buildings, &c., ought to be first deducted from the total rateable value, and distributed among the parishes in which this portion of the works was situate, according to the extent of such works in each parish; and that the residue of the rateable value should be apportioned

¹ *Rex v. New River Co.*, 1 M. & S. 508; 14 R. R. 514. Cf. *Rex v. Miller*, 3 Cowp. 619, where the spring was a mineral spring consumed on the ground, and not conveyed to a distance.

² 14 East, 609; 13 R. R. 333. Cf. *Chelsea Waterworks v. Putney Overseers*, 3 El. & Bl. 108; 29 L. J., M. C. 236; 2 L. T. 663; 6 Jur., N. S. 940.

³ 10 Q. B. 208; 16 L. J., M. C. 184.

among the parishes containing the service pipes, in the ratio of the net profits produced in each of those parishes.¹

This decision was followed in *Reg. v. West Middlesex*,² where the cases on the subject were fully reviewed, and also in the recent case of *Liverpool Corporation v. Llanfyllin Union*,³ in which it was held that, when arriving at the rateable value of a reservoir and waterworks, when part of the works lie outside the parish for which the assessment is made, the reservoir and waterworks must be taken as integral portions of the undertaking, and although rateable separately, must not, for the purpose of assessment, be valued apart from the rest of the undertakings; and also, that the effective capital value of the reservoir and works should be arrived at from their cost as a basis, and so that by a percentage of interest, the gross rental and rateable value can be arrived at. By the Acts which empowered the waterworks to be carried out the corporation had made roads and bridges, and substituted a church and schools and a vicarage for those submerged by the lake, and it was held on appeal that the expense incurred in carrying out these operations ought to be included in the calculation in ascertaining the capital value, in order to arrive at the rent which a hypothetical tenant would pay.

Rateability
under 32 & 33
Vict. c. 67.

Where under the Valuation of Property (Metropolis) Act (32 & 33 Vict. c. 67),⁴ s. 43, the mains and pipes of a waterworks company have been inserted in the quinquennial valuation list, a supplemental valuation list under sects. 46, 47 may be made during such period of five years, so as to include an increase in the value of the same mains by reason of their having been connected with newly-built houses since the date of the last valuation.⁵

Urban authorities and other public bodies supplying water

It remains to notice the rateability of bodies such as urban authorities and the like who purchase waterworks, or are empowered to provide them for special classes,⁶ the question in

¹ *Reg. v. London and South Western Rail. Co.*, 1 Q. B. 558; *Reg. v. Grand Junction Railway*, 4 Q. B. 18; *Reg. v. Cambridge Gas Light Co.*, 8 A. & E. 73; 47 R. R. 490; *Reg. v. New River Co.*, 1 M. & S. 503; 14 R. R. 514; *Reg. v. Kingswinford*, 7 B. & C. 236; 31 R. R. 181; *Reg. v. Woking*, 4 A. & E. 40; 43 R. R. 289.

² 28 L. J., M. C. 135. See judgment of Wightman, J.

³ *Liverpool Corporation v. Llanfyllin Assessment Committee and Llanwddyn*

Overseers, (1899) 2 Q. B. 14; 65 L. J., Q. B. 762; 80 L. T. 667; 63 J. P. 452. C. A.

⁴ An Act to provide for uniformity in the assessment of rateable property in the Metropolis.

⁵ *Reg. v. New River Co.*, L. R., 4 Q. B. D. 309; *Reg. v. St. Mary Islington Assessment Committee*, 4 Q. B. D. 309; 48 L. J., M. C. 123; 40 L. T. 322.

⁶ Cf. *ante*. Chap. V. p. 322; Castle, *Law of Rating*, pp. 359 *et seq.*

these cases being whether the fact of their acting expressly on behalf of the public entitles them to any exemption, or whether they are liable to be rated as private undertakers or bodies of adventurers.

rated formerly as private undertakings, but now only with reference to the actual profits earned.

In the cases of *The Queen v. Churchwardens of Longwood*,¹ *The Queen v. Kentmere*,² and *Reg. v. Township of Longwood*,³ where certain commissioners were empowered by the provisions of private Acts to supply townships with water, the latter view appears to have been taken—viz. that they should be rated as if the works had been a private undertaking: in the two cases about to be noticed, however, a different decision was arrived at.

*The Mayor of Liverpool v. Overseers of Wavertree*⁴ was a case in the Court of Queen's Bench stated under 12 & 13 Vict. c. 45, s. 11. It appeared that by certain statutes the appellants were empowered to supply water for domestic and other purposes within certain limits, including therein the borough of Liverpool. Pursuant to their statutory powers they maintained waterworks in the township of Wavertree. By *Liverpool Corporation Waterworks Act*, 1862,⁵ the corporation of Liverpool were to estimate and fix the amount of money necessary for defraying the costs, charges, and expenses payable out of the Liverpool water account for the year then current, and were to fix the rate in the pound at which the domestic water rent was to be charged at such amount as, regard being had to the several sources of revenue, would be sufficient in the aggregate to meet the estimated expenses payable out of the water account for the current year. The corporation were limited by the said Act from receiving any more money from the consumers than was requisite to pay the above-mentioned expenses, and in this respect their income differed from that of an ordinary trading company, inasmuch as it did not necessarily represent the full value of the use and enjoyment of the water to the consumers. One of the questions for the opinion of the Court was whether, in arriving at the gross annual value of the appellants' waterworks, the respondents ought to ascertain the gross receipts which the appellants might derive if they were a trading company earning a profit by water supply, and then make the

Mayor of Liverpool v. Wavertree.

¹ 13 Q. B. 116; 18 L. J., M. C. 65.

² 17 Q. B. 551; 21 L. J., M. C. 13.

³ 17 Q. B. 871; 21 L. J., M. C. 215.

⁴ 2 Ex. Div. 55, note 1.

⁵ 25 & 26 Vict. c. cvii., s. 59; *Liverpool Corporation v. West Derby Overseers*, 6 El. & Bl. 704; 28 L. J., M. C. 112; 2 Jur., N. S. 1002

statutory and proper deductions from the figure so obtained, or whether they were limited to the actual receipt.

Blackburn, J. (with whom Lush, J., concurred), said: "I think it clear that the appellants are right. The whole question turns on the rule given by the Parochial Assessment Act, which says the occupier is rateable at what a tenant from year to year will give as the rent, who takes the land subject to the same restrictions as those under which the appellants hold it. Now the tenant would only give such a rent as the restrictions imposed by statute would enable him to earn, and the rateable value is to be based upon that rent."

City of Worcester v. Droitwich Poor Law Union.

This principle was followed in the case of *The City of Worcester v. Droitwich Poor Law Union*,¹ where the local board of W. erected and occupied works for the purpose of supplying the inhabitants thereof with water, the works being situate in the parish of C. In order to benefit the inhabitants of W., the local board made the scale of charges so low as to leave a profit far less than would have accrued to a company carrying on the works as a commercial undertaking. In adopting the scale of charges above mentioned the local board intended to carry out those provisions of *The Public Health Act*, 1848, the object of which was to insure a supply of water at a low price for sanitary purposes. The assessment committee of the D. union, within which the parish of C. was situate, assessed the local board at a rateable value of 1,400*l.*, based upon the amount which might have been earned by a trading company carrying on the waterworks for their own benefit; but it was held, affirming the judgment of the Court of Appeal, that the local board were liable to be assessed at a rateable value of 540*l.* only, based upon the profit actually earned by them, for under the provisions of *The Public Health Act*, 1848, they could not make rates of an amount more than sufficient to enable them to maintain the waterworks, and they could be lawfully assessed only with reference to the profit actually earned.

Where land is occupied by a local authority for public purposes, the land is to be assessed to the poor rate at the rent which a tenant would pay if subject to the same restrictions as are imposed upon the local authority. Therefore, where a sanitary authority occupies land and works for the purpose of supplying its town with water, the authority being precluded by

¹ 2 Exch. D. 49; 46 L. J., M. C. 241; 36 L. T. 186.

law from making a profit out of these works, the rateable value of the lands and works is nothing.¹

In *Dewsbury Waterworks Board v. Pennistone Union*,² the appellants, a local board incorporated by a special Act (39 & 40 Vict. c. clxxxv.), were empowered by the Act to levy a public water rate, but it was provided that they should not levy any higher rate than might be required to discharge so much of the expenses of maintaining the waterworks, &c., as the amount of water rents and other payments for a supply of water should not be sufficient to discharge. *Held* (affirming the judgment of the Queen's Bench Division), that, in assessing the appellants to the poor rate in respect of their reservoirs, pipes and works, the amount collected by means of a water rate ought to be taken into account.

By the Merthyr Tydfil Water Act, 1858 (21 & 22 Vict. c. xii.), a local board of health was authorized to acquire waterworks, and by sect. 63 all sums paid out of the general district rate under the Act were to be repaid out of any balance standing to the credit of the waterworks account, after application to the objects to which moneys carried to that account were, under the provisions of the Act, to be primarily applied, and by sect. 71 all moneys received under the Act (other than money out of the district rate, or raised on mortgage), were to be applied, *inter alia*, in repaying any money advanced out of the general district rate under the powers and for the purposes of the Act. In assessing the local board to the poor rate in respect of the waterworks, a sum paid out of the general district rate for the purposes of the Act was included in the rateable value of the waterworks, and it was held, that the sum ought not to be included in the assessment; for it was received on terms as to repayment which prevented it from being available as an item of gross profit.³

The lessee of the tolls of a public bridge is not rateable as such, whatever rent he may pay; it not appearing that he was the occupier of any local visible property within the parish, nor that he was an inhabitant resident there deriving profit from

*Bridges and
bridge tolls.*

¹ *Peterborough Corporation v. Stamford Union*, 31 W. R. 949.

² 17 Q. B. D. 384; 55 L. J., M. C. 121; 54 L. T. 592; 34 W. R. 622; 50 J. P. 644, C. A.

³ *Merthyr Tydfil Local Board v. Merthyr Tydfil Union*, (1891) 1 Q. B. 186; 60 L. J., M. C. 42; 63 L. T. 646; 55 J. P. 294.

such tolls, beyond the rent paid by him for the same, which was applicable to the public purposes of the bridge.¹

A toll-house erected for the purpose of taking tolls at a gate nearest a highway which has never been used by the public except upon paying a certain sum is liable to be rated according to the amount of the tolls received; and the expressed amount of the rate is to be divided in proportion between the parishes in which the road is situated over which the right of passage is acquired by payment of such toll.² In *Williams v. Bedminster Assessment Committee*,³ where the appellant was the lessee of a toll-house and of certain tolls levied on passengers over a bridge on the site of an ancient ferry, and a rate was laid generally on the "toll-house and tolls," stating the "gross estimated value 800*l.*," and "rateable value 700*l.*"; it was held, that although the tolls were not themselves rateable, yet the toll-house was, and in assessing the latter, its value as enhanced by the facility it afforded for collecting the tolls was to be taken into account.

The principle that profits must be rated where they are earned, which has been noted above in the case of docks,⁴ applies as well to bridges, with regard to which the parochial principle also holds good.⁵

Bridges in
different
parishes.

Where the proprietors of Hammersmith Bridge had land on both sides of the river, on which they erected piers and abutments, but took the tolls on one side only, it was held that they were rateable for the lands on both sides, which were used by the proprietors for the purpose of passage over the Thames, in respect of which they received tolls.⁶

Similarly, the owner of a bridge resting on piles driven into the soil, one end of which was in the parish of A., and the other in the parish of B., where the toll-house was situated, was held rateable for an occupation of land in A. *pro rata*, though the road over the bridge was repaired by other persons.⁷

Exemption
of the Crown.

In *Reg. v. McCann*⁸ the Commissioners of Works and Buildings, empowered by statute to construct Chelsea Bridge, and to borrow

¹ *Rez v. Eyre*, 12 East, 416.

² *Reg. v. St. George the Martyr, Southwark*, 3 W. R. 515.

³ 45 L. J., M. C. 117; 34 L. T. 795.

⁴ *Reg. v. Bristol Dock Co.*, 10 L. J., M. C. 105.

⁵ See Castle. pp. 331, 332.

⁶ *Rez v. Barnes*, 1 B. & A. 113; 8

L. J., O. S., M. C. 115; 35 R. R. 235;

Reg. v. Paynter, 1 New Sess. Cas. 637;

7 Q. B. 255; 14 L. J., M. C. 179; 9 Jur.

877; *Rez v. St. George the Martyr*,

Southwark, 3 W. R. 515.

⁷ *Reg. v. Salisbury, Marquis of*, 3 N. & P. 476; 8 A. & E. 716.

⁸ 1 L. R., 3 Q. B. 677; 37 L. J., M. C.

120,000*l.* from the Treasury on an assignment of the tolls, which were to be applied in payment of the expenses of the bridge, including the repayment of the loan, after which no toll was to be charged to foot passengers, were held to be not liable to be rated to the relief of the poor, as they were in occupation of the bridge as servants of the Crown, deriving themselves no benefit from the receipt of the tolls, and were therefore exempt from the operation of 43 *Eliz. c. 2, s. 1*, as explained in *Jones v. Mersey Docks*.¹

It was decided in *Reg. v. Hammersmith Bridge Co.*² that a rate is to be apportioned between two parishes, according to the length of the bridge in each parish. "The approaches," said Lord Denman, C. J., "stand in the same relation to the bridge as "stations and warehouses to railways, reservoirs and wharves "to canals, aqueducts and mains to water supplies, gasometers "and mains to gas burners; and the principle for dividing the "direct from the indirect sources of profit, for rating the indirect "sources, and for apportioning the residuary net rateable value "among the districts in which the direct source was situate, was "explained in *Reg. v. Mile End Old Town*."³

Where the revenue of a bridge company, over and above the working expenses, was raised from tolls, but was wholly absorbed in the payment of mortgage debts, leaving nothing by way of interest for the shareholders, though there was a provision for paying them off (if the tolls were sufficient), when the tolls should cease, the company were nevertheless held to be rateable. Where, in such a case, money is raised for the construction of an undertaking, so as to cause a debt, the interest of which is paid for out of the profits, such interest is not allowed as a deduction.⁴

123; 19 L. T. 115; 16 W. R. 985; Exch. affirming 9 B. & S. 33.

¹ 11 H. L. C. 443; 35 L. J., M. C. 1; *ante*, p. 601.

² 18 L. J., M. C. 85; 15 Q. B. 369; 3 New Sess. Cas. 424; 13 J. P. 103. See *Castle*, pp. 283, 331.

³ 10 Q. B. 208. See *ante*, p. 615. Cf. as to royal bridges, *Castle*, pp. 21, 22, 26.

⁴ *Reg. v. Blackfriars Bridge Co.*, 8 L. J., M. C. 29; 9 A. & E. 828; 1 P. & D. 603. See *Castle*, pp. 145, 168, 331. With respect to county rates see *Reg. v. Aylesbury-cum-Walton*, 9 Q. B. 261; 4 Rail. Cas. 315; and with respect to highway rates see *Reg. v. Paynter*, 13 Q. B. 399; 3 New Sess. Cas. 465; 18 L. J., M. C. 168; 13 Jur. 281; see as regards land tax *Chelsea Waterworks v.*

Bowley, 17 Q. B. 358; 20 L. J., Q. B. 520; 15 Jur. 1129. As regards paving rates see *Reg. v. Manchester Waterworks Co.*, 3 D. & R. 20; 1 B. & C. 630; *Reg. v. East London Waterworks Co.*, 18 Q. B. 705; 21 L. J., M. C. 174; 16 Jur. 711; *Arnell v. Regent's Canal Co.*, 14 C. B. 564; 23 L. J., C. P. 155; 18 Jur. 632; 2 W. R. 457; *Arnell v. L. & N. W. Rly.*, 12 C. B. 697; as regards lighting rates see *Reg. v. Southwark and Vauxhall Water Co.*, 6 El. & Bl. 1008; 3 Jur., N. S. 411; 5 W. R. 71; *East London Waterworks Co. v. Mile End Old Town*, 17 Q. B. 512; 21 L. J., M. C. 49; 16 Jur. 121; as regards sewer rate see *East London Waterworks Co. v. Leyton Sewer Authority*, L. R., 6 Q. B. 669; 40 L. J., M. C. 190.

CHAPTER X.

OF THE REMEDIES FOR THE INFRINGEMENT OF RIGHTS
OF WATER.

THE remedies for the infringement of the various rights of water have been noticed incidentally in the previous chapters in connection with cases therein considered. A short summary of the procedure for the enforcement of such remedies is given in the following pages.

All infringements of rights of water either trespass or nuisance.

All infringements of rights of water, natural or acquired, come under one or other of two classes—trespass or nuisance. Where the act complained of is a wrongful disturbance of another in the exclusive possession of property, it is a trespass; where the infringement of the right is the consequence of an act which is not in itself an invasion of property, the cause from which the injury flows is termed a nuisance.¹ “The distinction between “nuisance and trespass,” says Mr. Angell,² “is that the former “is only a consequence or result of what is not directly or “immediately injurious, but its effect is injurious. A person “who digs a channel or erects a dam on his own land, does no “more than what is, in itself, lawful; but as the effect of his so “doing is to divert the water from a natural watercourse to the “loss of a riparian owner below, or to turn it back to the injury “of a riparian owner above, such acts become unlawful,—‘the law “‘in such instances taking care,’ says Blackstone, ‘to enforce the “‘precept of gospel morality of doing to others as we would that “‘they should do unto ourselves.’ Trespass, on the other hand, “is a direct and immediate invasion of property,—as treading “down grass in a neighbour’s field, or destroying his inclosures.”

This distinction between trespass and nuisance, so far as the form of action is concerned, is now of little value, as by *The Common Law Procedure Act*, 1852, and *The Judicature Acts*, 1873 and 1875, all forms of action are abolished.

¹ Phear, *Rights of Water*, p. 100; *Reynolds v. Clarke*, 2 Ld. Raymond, 1399; *Smith v. Milles*, 1 T. R. 475; *Courtney v. Collett*, 12 Mod. 164; 1 Ld.

Raymond, 274; *Leveridge v. Huskins*, 11 Mod. 257; 1 Str. 636.

² On Watercourses, p. 575.

Where the act complained of is an invasion of a public right—such as the obstruction of the public right of navigation or fishery, or the pollution of a river to the public prejudice—it is termed a public or common nuisance.¹

Public nuisance.

Remedy by Act of Party.

A private nuisance may be removed or abated by the party aggrieved, if it can be peaceably done and without a riot.² Thus if a ditch is dug, by means of which the water is diverted from the land of a riparian proprietor, through whose land it would otherwise flow in its natural course, he may go upon the land of the wrongdoer and fill it up;³ even though at the time it causes him only nominal damage.⁴ A thing, however, cannot be abated, until it actually becomes a nuisance; so that if one see his neighbour erecting that which it is probable will ultimately be such, it cannot be abated as long as it continues in an inoffensive state.⁵

Abatement of private nuisances.

If a person injured abate no more than is necessary, any damage resulting from the act will not be laid to his charge; but he must act reasonably and take reasonable care that no more damage be done than is positively necessary for effecting his purpose. Thus where one erected a mill-dam partly on his own land and partly on the land adjoining, upon which the owner of the adjoining land pulled down the part on his land, and the whole dam fell down and the water ran out, it was held that the owner was justified.⁶ But where the plaintiff had a right to irrigate his meadow by placing a dam of loose stones across the stream, and occasionally a board or fender, and he fastened the board with two stakes, which he had no right to do, the defendant was held liable to an action for pulling down the board as well as the stakes, although, as owner of the adjoining land, he had lawful power to abate the latter.⁷

No more damage must be done than absolutely necessary.

So in *Caukwell v. Russell*,⁸ where the plaintiff had a prescriptive right to send waste water down the defendant's drain, and he sent down also the foul water from his privies, it was held

¹ Woolrych on Waters, p. 192. See Stephen's Blackstone, p. 402.

² Blackstone's Com. 5; *Batten's case*, 9 Rep. 54 b.; 2 Roll. Abr.; Nuisance, 8; Angell, p. 576; Woolrych, p. 281.

³ Vin. Abr., Nuisance. See 9 Edw. IV. c. 35; 8 Edw. IV. c. 5; *Grey v. Brown*, Mo. 644; *Raikes v. Townshend*, 2 Smith's Rep. 9; 7 R. R. 776.

⁴ *Penraddock's case*, 5 Co. 101 b.

⁵ 12 Mod. 510; *Holt's cases*, 499.

⁶ *Wickford v. Bill*, Cro. Eliz. 269.

⁷ *Greenslade v. Halliday*, 6 Bing. 379; 53 R. R. 241; see also *Ward v. Robbins*, 15 M. & W. 237.

⁸ 26 L. J., Ex. 314. See *Hill v. Cock*, post, p. 624.

that the defendant was justified in stopping the whole drain ; for where a party has a right to send clean water down a drain and chooses to send dirty, every drop of it ought to be stopped, for the whole is dirty.

In the case of *Roberts v. Rose*,¹ the plaintiffs, by parol licence from one Lowe and from the defendant, made a watercourse and discharged water thereby, first across the land of Lowe, and then across the land of defendant. The defendant revoked his licence, and on the plaintiffs refusing to discontinue the discharge of water, entered on Lowe's land and obstructed the watercourse there. The defendant, by stopping the watercourse on his own land, would have done less damage to the plaintiffs than was actually done, but more damage to Lowe, and possibly some damage to the public. The Court held, that the watercourse had been obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after the revocation of the licence were wrongdoers, was subordinate to the convenience of innocent third parties and of the public. Blackburn, J., delivering the judgment of the Court of Exchequer Chamber, says: "We are all agreed, that where a person attempts to justify an "interference with the property of another in order to abate a "nuisance, he may justify against the wrongdoer so far as his "interference is positively necessary. We are also agreed, that "in abating a nuisance, if there are two ways of doing it, he "must choose the least mischievous of the two. We also think, "that if by one of these alternative methods, some wrong should "be done to an innocent third party or to the public, then that "method cannot be justified at all, although an interference with "the wrongdoer might be justified. Therefore, where the alter- "native method involves such an interference, it must not be "adopted ; and it may become necessary to abate a nuisance in "a manner more onerous to the wrongdoer."

In the case of *Hill v. Cock*,² the plaintiff, who had a prescriptive right to the flow of water led by means of a gutter from a mill stream at a point where an ancient weir was erected, wrongfully lengthened the gutter for the purpose of irrigating more land. The flow of water down the defendant's mill stream was thereby diminished, and he in consequence pulled down the ancient weir, and thereby prevented the water from flowing

¹ L. R., 1 Ex. 82 ; 35 L. J. Ex. 62 ; ² 26 L. T., N. S. 185.
13 L. T. 471.

down the plaintiff's gutter. The Court held that the defendant was not justified in stopping the plaintiff's excessive user of the water, by means which altogether prevented his enjoyment of the water, but only in stopping it by the least injurious means in his power. Willes, J., says: "The flow of water to defendant's mill was injured by the alteration of the gutter, and the plaintiff had thereby destroyed the measure of his right over the old course, and created a confusion of his antient right. If the whole of the defendant's enjoyment had been interfered with, as it was in the case of *Caukwell v. Russell*,¹ where the person who had a right to send clean water through his gutter sent down foul water, so that the nuisance could not be stopped without interfering with the enjoyment; if that had been the case, then the taking down of the weir would have been a reasonable mode of destroying the plaintiff's enjoyment. However, he is bound to abate the nuisance in the most reasonable manner, and subject to there being no confusion of the rights created, the jury have found that it was not practically necessary for the purpose of abating the nuisance to pull down the weir. If the extent of the excess was so great that it was reasonably impossible to abate the nuisance, then I should say there exists a right on the part of the proprietor of the servient tenement to interfere with the whole."²

No previous demand to remove the nuisance is requisite, except where the tenement on which the nuisance is erected has passed into other hands since the erection; and in this case, without such demand, the abatement would not be lawful, for the new occupant was not liable to a *quod permittat* before request made; but the demand may be made either on the lessor or lessee, for the continuance of a nuisance by the lessee, against whom an action will lie.³

No previous demand to remove necessary.

A public nuisance may also, it would appear, be abated in a peaceable manner.⁴ A private individual, however, is not justified

Abatement of public nuisance.

¹ 26 L. J., Ex. 34.

² See also *Arlett v. Ellis*, 7 B. & C. 346; 31 R. R. 214; *Yard v. Ford*, 2 Wms. Saund. p. 571, ed. 1871; *Lawton v. Ward*, 1 Ld. Raymond, 75; *Luttrell's case*, 4 Rep. 86 b.

³ Gale on Easements, p. 547; *Pennraddock's case*, 5 Rep. 101; *Jones v. Williams*, 11 M. & W. 176; *Davies v.*

Williams, 16 Q. B. 546; *Burling v. Read*, 11 Q. B. 908; *Perry v. Fitzhove*, 8 Q. B. 778; *Brent v. Haddon*, Cro. Jac. 555; see also *Sarby v. Manchester*, L. R., 4 C. P. 198.

⁴ *Lodie v. Arnold*, Salk. 458; *James v. Hayward*, Cro. Car. 184; *Rolle, Abr. Nusans (T.)*; *Hill's case*, Cro. Eliz. 384.

in abating a public nuisance, unless it does him a special injury beyond that which is suffered by the rest of the public.¹ In the case of *The Mayor of Colchester v. Brooke*,² it was held, that if oyster beds are placed in the channel of a public navigable river so as to create a public nuisance, a person navigating is not justified in damaging such property by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. So in *Dimes v. Petly*,³ the defendant under similar circumstances was held not justified in running his ship against a wharf of the defendant's projecting into a public navigable river,—the Court holding that a person under such circumstances can only interfere with a public nuisance as far as is necessary to exercise his right of passing along a highway, and cannot justify doing any damage to the property of the person who has improperly placed the nuisance in the highway, if, avoiding it, he might have passed on with reasonable convenience. In *Black v. Bateman*,⁴ Lord Campbell, C. J., goes so far as to say he cannot justify, unless there was no way in which he could exercise his right without the removal.

Remedy by Act of Law.

By action.
Private
nuisances.

The remedy by act of law for the infringement of water rights is now by action in one of the first four Divisions of the High Court of Justice.⁵ By the Supreme Court of Judicature Acts all the jurisdiction of the Court of Chancery and of the Common Law Courts has been transferred to the High Court of Justice, which is to administer law and equity concurrently, and where there is any conflict between the rules of equity and common law, the rules of equity are to prevail. New rules of pleading and forms are provided which supersede the old forms. Either the Chancery Division or those Divisions which represent and are called after the old Common Law Courts, have equal power to award damages and the remedy by injunction and mandamus, to

Injunction
and manda-
mus.

¹ *Benjamin v. Storr*, L. R., 9 C. P. 400; *Hubert v. Groves*, 1 Esp. 148; *Winterbotham v. Derby*, L. R., 2 Ex. 316; 36 L. J., Ex. 194; 16 L. T. 771.

² 7 Q. B. 339.

³ 15 Q. B. 283.

⁴ 18 Q. B. 876.

⁵ Judicature Acts, 36 & 37 Vict. c. 66, s. 16, 35; 38 & 39 Vict. c. 77, s. 11.

The Court of Chancery has jurisdiction to entertain a bill at the suit of the commissioners of sewers appointed under 23 Hen. VIII. c. 5, notwithstanding that such commissioners are a Court of record: *Crossman v. Bristol and S. Wales Union Rly.*, 3 Hem. & M. 531; 11 W. R. 981.

enforce equitable rights, and receive and carry out equitable defences.¹

The prerogative of the Crown to intervene in actions affecting the rights or revenue of the sovereign has not been affected by the Judicature Acts, and for the determining of such matters, the Exchequer Division of the High Court of Justice has all the powers formerly possessed by the Court of Exchequer.² In *A.-G. v. Constable* an application by the Attorney-General, on behalf of her Majesty, to restrain an action brought in the Chancery Division, and to remove it into this Division, was granted on the ground that the matter in question in the action concerned her Majesty's revenue and privileges. The action was brought by Sir Frederick Constable and Thomas Constable against the Humber Conservancy Commissioners and others, claiming a declaration that the plaintiffs in that action were seised of the foreshore of the river Humber and the estuary thereof within the seignory, liberty, manor, and fee of Holderness, in the county of York, and for an order on the defendants in that action to deliver up possession of certain parts thereof, and for an injunction to restrain them from continuing in possession thereof.

By *The County Courts Act, 1888* (51 & 52 *Vict. c. 43*), which repeals *The County Courts Act, 1867*,³ the County Courts have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditament⁴ comes in question, when neither the value of the land, tenements, or hereditaments in dispute nor the rent payable in respect thereof shall exceed 50*l.* per annum, or, in case of an easement or licence, where neither the value of the lands, tenements or hereditaments in respect of which the easement or licence is claimed shall exceed 50*l.* per annum. By sect. 64 jurisdiction is given in all actions assigned to the King's Bench

¹ Where an action to quiet possession is brought in the Chancery Division, the judge before whom it is tried has power and is bound to decide of the whole case as between the parties. If the defendants desire a trial before a jury, the time to apply for that purpose is when the mode of trial is directed: *Hamilton v. A.-G. for Ireland*, 5 L. R., Ir. C. L. 555. Upon a petition filed in the Irish Landed Estates Court for a declaration of title to a several fishery:—Held, that under the circumstances, the petitioner ought to have taken proceedings in a Common Law Court to have the nature of the fishery ascer-

tained and its limit defined before coming to the Landed Estates Court: *Ackeson's Estate, In re*, Ir. R., 3 Eq. 105.

² *A.-G. v. Constable*, (1879) 4 Ex. D. 172; 48 L. J., Ex. 455. *A.-G. v. Barker*, L. R., 7 Ex. 177, cited by Kelly, C. B., as governing the application; see also *A.-G. v. Reece*, 1 T. L. R. 675, as to proceeding by English information in the Ex. Div., *post*, p. 642.

³ 30 & 31 *Vict. c. 142*, s. 12.

⁴ A claim by custom as an inhabitant of a town to fish in private waters is not a "hereditament": *Lloyd v. Jones*, 6 C. B. 81; 17 L. J., C. P. 206.

Division, where the parties agree by a memorandum signed by them or their solicitors that a named Court shall have jurisdiction. The County Court also has all the powers and authority of the High Court for *specific* performance of, or the reforming, delivering up or cancelling of any agreement for the sale, purchase or lease of property, where the purchase-money, or if a lease the value of the property, shall not exceed 500*l.* (sect. 67 (4)). Under the Judicature Act, 1893 (sect. 89), a County Court shall in any proceeding¹ (*i.e.* action or suit) grant such relief or remedy or combination of remedies, and give effect to every ground of defence or counter-claim, equitable or legal, in as full and ample a manner as if the action were in the High Court, and has, therefore, power to grant a mandamus or injunction and appoint a receiver.² By sect. 90 a defence or counter-claim, involving matter beyond the jurisdiction of the Court shall not prevent the Court disposing of the whole matter, so far as it relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to grant is to be given to the defendants.³

Appeals.

By the Judicature Act, 1894 (57 & 58 Vict. c. 16) considerable restrictions are placed upon the right of appeal in general, and it is especially provided that "in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal," but in *other matters* in the King's Bench Division it would seem that an appeal from a judge is still to a Divisional Court (Order LIV. r. 23). Also by sect. 1, sub-sect. 5 of the last-mentioned Act, in all cases where there is a right of appeal to the High Court from any Court or person, the appeal is to a Divisional Court, the decision of which is final unless leave to appeal is given by that Court or by the Court of Appeal.

Parties entitled to sue.

The tenant in possession may sue for a nuisance, even though it be of a temporary nature only, but if the nuisance be of a permanent nature, and injurious to the inheritance, the reversioner may also have an action, and both the tenant in possession and the reversioner are respectively entitled to recover damages commensurate with the damage sustained by him,⁴ but a tenant

¹ *Pryor v. City Offices Co.*, 10 Q. B. D. 504.

² Where an injunction or mandamus or the appointment of a receiver is sought as part of the relief, it is better to include notice of such claim in the particulars: Annual County Courts

Practice, 1902, vol. i. p. 136.

³ A judge of the High Court may, however, order, on the application of any party, that the whole proceeding be transferred to the High Court.

⁴ Angell on Watercourses, p. 585; Gale on Easements, pp. 550—556;

under a building agreement with the lord of a manor who has only a right of entry upon the foreshore for the purposes of that agreement cannot maintain an action for taking shingle therefrom or putting bathing machines thereon.¹ To entitle the reversioner to sue, it must be shown either that the act done is an act necessarily injurious to the reversioner, or, where it is not necessarily injurious, the declaration must aver that the reversionary interest is thereby injured.² In an action brought by a reversioner against the defendant for the non-repair of a gutter, whereby the water oozed through and carried away the soil of the close, the defence was, that the injury was the consequence of the tenant in possession penning back the water and watering his meadow. Tindal, C. J., said he thought this no defence, as the owner of the reversion was suing for a permanent injury to his estate, and that he could not be met with the answer that the injury arose out of the wrongful act of the tenant, for which the defendant might have maintained an action against him. That was merely the personal act of the tenant; and it did not appear that there was any legal duty in the owners and occupiers of the close to do any act, the neglect of which by the tenant had caused the injury.³

Building a roof with eaves which discharge rain-water by a spout into adjoining premises is an injury which the landlord of such premises may recover as reversioner while they are under demise, if the jury think there is damage to the reversion.⁴

In *Dyson v. Collick*,⁵ a contractor for making a canal having, by permission of the owner of the land, laid down a dam for the

Comyns's Dig., Action for Nuisance (B); *Jackson v. Perked*, 1 M. & S. 234; 14 R. R. 417; *Alston v. Scales*, 9 Bing. 3; 35 R. R. 502; *Baxter v. Tayler*, 4 B. & A. 72; 38 R. R. 227; *Bell v. Twentyman*, 1 A. & E. 766; see also *Hopwood v. Schofield*, 2 Moo. & Rob. 34; *Tucker v. Newman*, 11 A. & E. 40; *Fay v. Prentice*, 1 C. B. 828; *Kidgell v. Moor*, 9 C. B. 364; *Metropolitan Association v. Petch*, 5 C. B., N. S. 504; *Mumford v. Oxford Rly.*, 1 H. & N. 34; *Sampson v. Savage*, 1 C. B., N. S. 347; *Bell v. Midland Rly.*, 10 C. B., N. S. 287; *Crump v. Lambert*, L. R., 3 Eq. 409; *Johnstone v. Hall*, 2 K. & J. 414; *Mott v. Shoulbred*, L. R., 2 Eq. 22; *Jones v. Chappell*, L. R., 20 Eq. 539; *Wilson v. Townsend*, 1 Dr. & S. 324; *Cleare v. Mahony*, 9 W. R. 882; *Broder v. Saillard*, 2 Ch. D. 692; 45 L. J., Ch. 414;

Gillon v. Boddington, 1 Car. & P. 541; 29 R. R. 243, n.; see also *Partridge v. Bere*, 1 D. & R. 272; 24 R. R. 487.

¹ *Laird v. Briggs*, 19 Ch. D. 22.

² *Metropolitan Association v. Petch*, 5 C. B., N. S. 504; *Bell v. Midland Rly.*, 10 C. B., N. S. 287; 30 L. J., C. P. 273; 4 L. T. 293. As to whether "person entitled to any reversion" in the 8th section of the Prescription Act includes a remainder man, see *Laird v. Briggs*, 19 Ch. D. 22.

³ *Egremont v. Putman*, 1 Moo. & Malk. 404. As to the right of a Trades Protection Society to sue a dock company, see *London Association of Ship Owners v. London and India Docks*, (1892) 2 Ch. 242; 67 L. T. 238.

⁴ *Tucker v. Newman*, 11 A. & E. 40.

⁵ 5 B. & Ald. 600; 24 R. R. 484.

purpose of the navigation, was held to have sufficient possession to enable him to maintain trespass against a wrongdoer.¹

Joinder of
plaintiffs.

By Order XVI. r. 1 of *The Judicature Act*, 1875, amended by R. S. C., Oct. 20th, 1896 :²—

“All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative where, if such persons brought separate actions, any common question of law or fact would arise; provided that, if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a judge may order separate trials or make such other order as may be expedient. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though, unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the Court or a judge in disposing of the costs shall otherwise direct.”

By Order XVI. r. 4 :—

“All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment.”

By Order XVIII. r. 1 :—

“Subject to the following rules of this Order, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or judge may order separate trials of any of such causes of action to be had, or may make such order as may be necessary or expedient for the separate disposal thereof.”

By the rules of Chancery, which are followed by the Judicature Acts, the owners of several properties affected by a nuisance

¹ See *ante*, p. 234, as to rights of action for disturbance of easements.

² As to the original order, see Wilson's *Judicature Acts*, 7th ed. (1888), pp. 172—193; and for rule 1 of the Order in its present form and the history of its amendment, see the *Yearly Supreme*

Court Practice, 1902, by Muir Mackenzie, Lushington and Fox, p. 200. See, too, *ibid.* p. 228, as to Order XVIII. r. 1, respecting joinder of causes of action, which must be read in conjunction with rules 1 and 4 of Order XVI.

might join in suing. If one failed to make out his case, the suit as to him was dismissed with costs. Such costs were deducted from those of the successful plaintiff.¹

The purchaser of an estate injured by a nuisance may sue the original wrongdoer—the person who erected and still maintains the nuisance—without notice or request to abate, for the damage done to the land while he owned and occupied it. Nor does it matter in this respect how many times the land injured may have changed hands since the erection of the nuisance.²

He who has been the author of a nuisance is answerable for all the consequences thereof,³ and although after damages recovered in an action for erecting it, another action cannot be maintained for the erection, yet it may for a continuance of the same nuisance. The continuance of that which was originally a nuisance is, in fact, a new nuisance.⁴ For the continuance of a nuisance, each successive owner of the land on which there exists an actual nuisance, is liable, though it may have been begun before his estate commenced.⁵

Parties liable to be sued

Where, however, the party was not the originator of the nuisance, a request must be made to remove it before any action is brought; but it is sufficient if such request is made to the party in possession, though he be only lessee;⁶ and a request to a former occupier while in possession has been held sufficient to bind a subsequent occupier.⁷

If the owner of land on which a nuisance exists lets the land, an action for the continuance of the nuisance will lie at the option of the party injured, either against the landlord or the tenant;⁸ but no such action lies against the landlord for any

for continuance of nuisance

¹ *Umfreville v. Johnson*, L. R., 10 Ch. 580; 44 L. J., Ch. 752; *Pollock v. Lester*, 11 Ha. 274; see, however, *Hudson v. Maddison*, 12 Sim. 416. In the case of *Cowan v. Duke of Buccleuch*, 2 App. Cas. 344, the House of Lords held, that by the practice of the Scotch Courts, in a case of nuisance by pollution, the several sufferers may combine and bring a joint action against the several authors of the nuisance—asking a declarator and interdict, but not claiming damages.

² *Angell on Watercourses*, p. 587; *Penruddock's case*, 5 Rep. 100; *Eastman v. Amoskeag Manufacturing Co.*, 4 N. H. 143 (*American case*); *Shadwell v. Hutchinson*, 2 B. & A. 97; 4 C. & P. 333; 36 R. R. 497; *Batishill v. Reed*, 18 C. B. 696; *Wilson v. Petu*, 6 Moo.

47; *Gillon v. Boddington*, 1 Car. & P. 541; 29 R. R. 243, n.; *Gale on Easements*, pp. 550—556.

³ Under the Crown Suits Ordinance of 1876, s. 18, sub-s. 2, the Crown can be sued in tort: *A.-G. v. Wemyss*, 3 App. Cas. 192—P. C.

⁴ *Angell on Watercourses*, p. 587.

⁵ *Gale on Easements*, p. 557.

⁶ *Penruddock's case*, 5 Rep. 181; *Brent v. Hudson*, Cro. Jac. 555; *Jones v. Williams*, 11 M. & W. 176.

⁷ *Salmon v. Bensley*, Ry. & M. 189, at Nisi Prius; 27 R. R. 745.

⁸ *Todd v. Flight*, 9 C. B., N. S. 377; *Mason v. Sheehy*, L. R., 6 Q. B. 585; *Christian Smith's case*, Sir W. Jones, 272; *Roswell v. Prior*, 2 Salk. 460; *R. v. Pedley*, 1 A. & E. 822; 40

such act of his tenant during the continuance of his tenancy ;¹ and a declaration charging the defendant with the duty of cleansing drains, merely as owner and proprietor thereof, is bad.² If, however, a landlord makes a drain for the use of his tenants, and keeps it in his own possession, and allows them to use it, he is liable if it becomes a nuisance through their user whilst in his possession.³

A landlord has been held not liable if he has taken a covenant to repair from the tenant, as in such case he does not authorize the continuance of the nuisance.⁴

by a stranger.

So the owner of land has been held not responsible for the act of a stranger causing or continuing a nuisance, which he neither authorized nor adopts. Thus, in *Saxby v. Manchester Railway*,⁵ the defendants were owners of the soil of a stream which supplied water to two print works. A., whilst occupier of both works, erected a weir across the stream, and thereby diverted the water from one of the works. The plaintiff becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from defendants, and against their will, replaced the weir. The Court held that the defendants were not responsible for the act of A., or for the continuance of the nuisance; and that a nonsuit which had been directed was right.⁶

Whether
proof of
actual
damage is
necessary to
support an
action.

Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action; but it is sufficient to show the violation of the right, and the law will presume damage.⁷

Thus, in *Rose v. Groves*,⁸ where the plaintiff was the owner of a public-house on a navigable river, and defendant obstructed his right of access thereto, by placing floats of timber in front thereof, the Court held that, this being the obstruction of a private right, proof of special damage was unnecessary.

R. R. 444; *Thompson v. Gilbert*, 7 M. & W. 456; see, however, *Rypon v. Bowles*, Cro. Jac. 373.

¹ *Cheetham v. Hampson*, 4 T. R. 318; 2 R. R. 397; *Rich v. Banterfield*, 4 C. B. 783; *Bishop v. Bedford*, 1 E. & E. 697; *Preston v. Norfolk*, 2 H. & N. 735; *Bartlett v. Baker*, 3 H. & C. 153.

² *Russell v. Shenton*, 3 Q. B. 449.

³ *Brown v. Russell*, 1 L. R., 3 Q. B. 261.

⁴ *Pretty v. Bickmore*, L. R., 8 C. P. 401; *Gwinnett v. Eamer*, L. R., 10 C. P. 658; see *Gandy v. Jubber*, 5 B. & S. 78, 485; 9 B. & S. 15; *Robbins v. Jones*,

15 C. B., N. S. 240.

⁵ L. R., 4 C. P. 198.

⁶ See also *Daniells v. Putter*, 4 C. & P. 262; 34 R. R. 793. For other cases on responsibility for nuisance, see *Pendleby v. Greenhalgh*, 1 Q. B. D. 36; *Pickard v. Smith*, 10 C. B., N. S. 470; *Hyams v. Webster*, L. R., 2 Q. B. 138; *Hadley v. Taylor*, L. R., 1 C. P. 53.

⁷ Per Parke, B., in *Embrey v. Owen*, 6 Ex. 353; *Wood v. Waud*, 3 Ex. 748; see *ante*, Chap. III.

⁸ 5 M. & G. 613; see also *Lyon v. Fiskmangers' Co.*, 1 App. C. 662.

Upon an information filed by the Attorney-General to restrain a public body from transgressing powers conferred by Act of Parliament, it is not necessary to prove that an injury to the public will result from the acts complained of; and in this respect there is no difference between an *ex officio* information and an information at the relation of a private individual.¹

Any unreasonable and unauthorized use of the common benefit of the flow of water, as between riparian proprietors, will give a right of action to the party whose rights are infringed, without proof of actual damage. Thus, the claim by an upper riparian proprietor, to divert permanently the whole of a stream, for the purpose of supplying a town with water, is not a reasonable use connected with the tenement of that proprietor, and he will be restrained from so using the water, though no injury has been sustained by the lower riparian proprietor.²

In *Pennington v. Brinsop Hall Co.*,³ plaintiff claimed as a riparian proprietor of a mill, and also as having forty years' prescriptive right to the use of pure water. Defendants alleged, admitting the pollution, that the water did no appreciable injury to plaintiffs, and that the water was first polluted by others. They urged that if an injunction was granted they would be ruined. Fry, J., said: "Plaintiffs allege that the defendants pollute the stream so as to create an injury to plaintiffs' rights, and they say, 1st, that this is an injury accompanied by damage; and 2nd, that if it be unaccompanied by damage they have nevertheless a good cause of action. This second proposition of plaintiffs is, in my judgment, well founded. . . . I may observe, in passing, that the case of a stream affords a very clear illustration of the difference between injury and damage, for the pollution of a clear stream is to a riparian proprietor below both injury and damage, whilst the pollution of a stream already made foul and useless by other pollutions is an injury without damage, which would,

¹ *A.-G. v. Corkermouth Local Board*, L. R., 18 Eq. 172; 44 L. J., Ch. 118; 30 L. T. 590; see *ante*, Chap. III.

² *Swindon Waterworks v. Wilts Canal*, L. R., 7 H. L. 697; *Claxton v. Claxton* Ir. R., 7 C. L. 23; *Harrop v. Hirst*, L. R., 4 Ex. 43; *Sampson v. Hoddinot*, 1 C. B., N. S. 590; *Ellwell v. Crouther*, 10 W. R. 615; *Medway v. Romney*, 9 C. B., N. S. 575; *Northam v. Hurley*, 1

E. & B. 665; *Mason v. Hill*, 5 B. & A. 1; 39 R. R. 354; *Earl Ripon v. Hobart*, 3 Myl. & K. 159; 41 R. R. 40; *Williams v. Moreland*, 2 B. & C. 910; 26 R. R. 579.

³ 5 Ch. Div. 769; see also *Cloues v. Staffordshire Potteries*, L. R., 8 Ch. 125; *Croasley v. Lightowler*, L. R., 2 Ch. 478; *St. Helens v. Tipping*, 11 H. L. 642; *A.-G. v. Leeds*, L. R., 5 Ch. 583.

"however, at once become both injury and damage on the
"cessation of the other pollutions."

A riparian proprietor exercising in a reasonable way his ordinary riparian rights, will not, however, be liable to an action unless he work actual damage to another riparian owner above or below him.¹

"By the general law," says Lord Kingsdown, "applicable
"to running streams, every riparian proprietor has a right to
"what may be called the ordinary use of the water flowing past
"his land, for instance, to the reasonable use of the water for his
"domestic purposes and for his cattle, and this without regard
"to the effect which such use may have in case of deficiency
"upon proprietors lower down the stream. But, further, he
"has a right to the use of it for any purpose, or what may be
"deemed the extraordinary use of it, provided he does not inter-
"fere thereby with the rights of other proprietors either above
"or below. Subject to this condition he may dam it up for the
"purpose of a mill, or divert the water for the purpose of irriga-
"tion. But he has no right to interrupt the regular flow of the
"stream if he thereby interferes with the lawful use of the water
"by other proprietors and inflicts upon them a sensible injury."²

Public nuis-
ance, when
actionable

To entitle a private person to maintain an action for a thing which amounts to a public nuisance, he must show that he has sustained a particular damage or injury other than and beyond the general injury to the public, and that such damage is direct and substantial.³ Thus, in *Rose v. Miles*,⁴ where the plaintiff was obstructed in his use of a navigable water, and was damaged by being obliged to unload his barge and carry his goods overland, the Court held that he had a good cause of action.

and indict-
able.

A party guilty of causing a public nuisance may be prosecuted by indictment, upon which he may be fined and imprisoned, and judgment given to abate the nuisance;⁵ the

¹ *Embrey v. Owen*, 6 Ex. 353; *Orr Ewing v. Colquhoun*, 2 App. C. 839; *Bickett v. Morris*, L. R., 1 H. L., Sc. 47; *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 697; *Holker v. Porritt*, L. R., 10 Ex. 59; see also *Weeks v. Howard*, 10 W. R. 557.

² *Miner v. Gilmour*, 12 Moo. P. C. 131; see *ante*, Chap. III., pp. 181 *et seq.*

³ *Benjamin v. Storr*, L. R., 9 C. P. 400; *Hubert v. Groves*, 1 Esp. 148; *Ricket v. Metropolitan Rly.*, L. R., 2 H. L. 175; 5 B. & S., p. 761, per Erle,

C. J.; *Winterbotham v. Lord Derby*, L. R., 2 Ex. 316; *Pain v. Patrick*, 3 Mod. 289.

⁴ 4 M. & S. 101; 16 R. R. 405; see *Hart v. Barnett*, T. Jones, 156; *Greasley v. Codling*, 9 Moo. 489; 27 R. R. 626; *Wiggins v. Boddington*, 3 C. & P. 544; 33 R. R. 699.

⁵ 4 Blackstone's Com. 167; *Reg. v. Wigg*, Salk. 460; *Res v. Russell*, 6 B. & C. 566; 30 R. R. 432; *Res v. Ward*, 4 A. & E. 384; 43 R. R. 364; *Res v. Lindall*, 6 A. & E. 143; *Res v. Morris*, 1 B. & A. 441.

question in all such cases being whether the acts done amount to a nuisance.¹

Another remedy for a public nuisance is by information at the suit of the Attorney-General. When a person has sustained special damage over and above the general damages sustained by the public, there may be both an information and an action. The Attorney-General may file an information to restrain the thing complained of as a public nuisance; and the individual who sustains a particular damage may join as plaintiff as well as relator and have the remedy for himself by action.²

Information
and suit.

A local board might sue in respect of a public nuisance without making the Attorney-General a party;³ but under *The Public Health Act*, 1875, the sanction of the Attorney-General is required if proceedings are taken for the purpose of protecting a watercourse from pollution.⁴

An information will lie against a corporation which has become a sanitary authority under the Public Health Act, for allowing sewage to continue to run from a drain in the town into a canal; and they are liable to be restrained by injunction from continuing such nuisance, though they derive no profit from the works causing the nuisance.⁵

The proper remedy against a county for non-repair of a bridge⁶ is by indictment, and no action will lie against the inhabitants of a county for an injury sustained in consequence of a county bridge being out of repair.⁷ By 5 & 6 Will. IV. c. 11, s. 5, an indictment for non-repair of bridges may be removed by *certiorari* into the Court of King's Bench.

Indictment
for non-
repair of
bridges.

On a similar principle it has been held that no action for personal and peculiar damage resulting from the want of proper repair in a county bridge will lie against the county surveyor, either at common law, or under 43 Geo. III. c. 59.⁸

¹ *Rex v. Medley*, 6 C. & P. 292.

² Kerr on Injunctions, p. 167; *A.-G. v. Johnson*, 2 Wils. C. C. 87; 18 R. R. 156; *A.-G. v. Sheffield*, 3 D., M. & G. 304; *A.-G. v. Lonsdale*, L. R., 7 Eq. 377; *A.-G. v. Halifax*, 17 W. R. 1088; *A.-G. v. Hackney*, L. R., 20 Eq. 626; *A.-G. v. Birmingham*, 4 K. & J. 328; *A.-G. v. Cockermouth*, L. R., 18 Eq. 172.

³ *Nuneaton Local Board v. General Sewage Co.*, L. R., 20 Eq. 127.

⁴ 38 & 39 Vict. c. 55, s. 69.

⁵ *A.-G. v. Basingstoke*, 45 L. J., Ch. 726.

⁶ *Rex v. Bucks*, 12 East, 192; 11 R. R. 347; cf. *Rex v. West Riding of Yorkshire*, 2 East, 342; 6 R. R. 439; *Rex v. Hendon*, 4 B. & A. 628; 38 R. R. 333; *Rex v. Lancashire*, 2 B. & A. 813; 36 R. R. 753; *Rex v. Northampton*, 2 M. & S. 262; 15 R. R. 241; *Rex v. Whitney*, 4 N. & M. 594; 3 A. & E. 69; 7 C. & P. 208; 42 R. R. 329. As to bridges generally, see *ante*, Chap. VIII.

⁷ *Russell v. Devon*, 2 T. R. 667; 1 R. R. 585.

⁸ *Mackinnon v. Penon*, 8 Exch. 319.

An indictment will not lie for the non-repair of a bridge unless it be in a highway. "Highways" is a general term for all public ways, as well cart, horse, and footways, and an indictment lies for any one of these ways if they are common to all the Queen's subjects.¹ If a way be in decay an indictment of necessity lies, for an action on the case will not lie without special damage,² and no action on the case will lie against inhabitants of a county for non-repair of a bridge, because they are not a corporation, and cannot be sued.³

The Court of Quarter Sessions cannot impose more than one fine for the non-repair of a bridge.⁴

Injunctions.

Interlocutory.

In cases of nuisance and injury to the rights of property, the Courts will interfere by injunction in aid of the legal right for the purpose of protecting the property from damage. Thus an interlocutory injunction will be granted to protect the property from irreparable, or at least from substantial or material damage pending the trial of the right.⁵ After the establishment of

Per Pollock, C. B.: "This was an action against defendant as surveyor of a county bridge for a particular damage sustained by the plaintiff in consequence of a want of repair of a county bridge. . . . The only question is, whether an action for a peculiar damage resulting to the plaintiff for want of proper repair to a county bridge will lie against the county's surveyor.

"There is no doubt of the truth of the general rule that when an indictment can be maintained against an individual or a corporation for something done to the general damage of the public, an action on the case can be maintained for a special damage thereby done to an individual, as in the ordinary case of a nuisance on the highway by a stranger digging a ditch across it, or by the default of the person bound to repair *ratione tenuræ*. . . . (*Mayor of Lyme Regis v. Henley*, 5 Bing. 91; 8 Bligh, 690; 37 R. R. 125, as to repair of sea walls). . . . But it has been held, no such action on the case would lie against the inhabitants of a county for a special injury sustained by a plaintiff by reason of their neglect to repair a county bridge (*Russell v. Men of Deron*, 2 T. R. 667; 1 R. R. 585). We think it clear, on the full consideration of that case, that the only reason why the action would not lie was

"because the inhabitants of the county were not a corporation and could not be sued,—a difficulty which was got rid of in the case of the Statutes of Hue and Cry by giving a specific remedy against the hundred. We have then to decide whether the 4th section of 42 Geo. III. c. 59 removes that difficulty. . . . We have, therefore, come to the conclusion that judgment ought to be arrested."

¹ *Reg. v. Saintiff*, 6 Mod. 255; Holt, 129.

² *Ibid.*; 2 Lord Raymond, 1174.

³ Pollock, C. B., in *Mackinnon v. Pearson*, 8 Exch. 319. As to evidence admissible on indictments for non-repair of bridges, see *Ilex v. Adderbury East*, 1 D. & M. 324; *Reg. v. Bedfordshire*, 4 E. & Bl. 535; *Re v. Buckingham*, 8 B. & C. 375; 2 M. & M. 412.

⁴ *R. v. Machyneth and Penegoes*, 4 B. & A. 469; 23 R. R. 349. As to costs, see *Reg. v. Bedfordshire*, 4 E. & Bl. 535; 1 Jur., N. S. 208; 24 L. J., Q. B. 81; *Reg. v. Merionethshire*, 1 New Sess. Cas. 316; 6 Q. B. 343; 8 Jur. 778; 13 L. J., M. C. 158; *R. v. Houlgrave*, 1 B. & A. 312; 19 R. R. 332; *R. v. Bird*, 2 B. & A. 522; *R. v. Dorset*, 15 East, 594; as to stay of judgment, see *R. v. Southampton*, 2 Chitty, 215; 13 R. R. 443.

⁵ See Kerr on Injunctions, 3rd ed., pp. 9, 14, 612, 613, 630. As to undertakings in damages when interim injunctions are granted, see *East Moulsey*

the right, and of the fact of its violation, a man is in general entitled, as of course, to a perpetual injunction to prevent the recurrence of the wrong, unless there be something special in the circumstances of the case.¹

Perpetual.

If the case made out is such that the recovery of damages will give a full and adequate compensation for the injury, no foundation is laid for the interference of the Court by way of injunction. If, on the other hand, the injury is of so material a nature that it cannot be well or fully compensated by the recovery of damages, or be such as from its continuance and permanent mischief might occasion a constantly recurring grievance, a foundation is laid for the interference of the Court by way of injunction.² The order may be framed so as to compel a defendant to restore things to their former condition; and when framed in such a form it is called a mandatory injunction.³ The jurisdiction of the Court is founded on the equity of relieving a man from the necessity of bringing repeated actions for damages for every violation of a common law right, and of finally quieting the right, after a case has received such full decision as entitles a man to be protected against further trials of the right.⁴

Foundation for interference of the Courts by injunction.

Mandatory injunctions.

Where, therefore, an action for damages by a riparian proprietor lies for an interference with a stream, the Court will interfere by injunction to restrain the nuisance, even where no actual damage is proved, to prevent the inconvenience of repeated actions;⁵ and also where the act done is claimed as of right, on the ground that the repetition of the act would at the end of twenty years establish a right in the claimant in derogation of the prior right.⁶ Where the Court is of opinion

Injunctions granted to prevent repeated actions,

and to prevent acquisition of rights.

Local Board v. Lambeth Waterworks, (1897) 2 Ch. 289; 62 L. J., Ch. 82; 67 L. T. 493.

¹ Kerr on Injunctions, pp. 9, 42—44, 637—646; *Wood v. Sutcliffe*, 2 Sim., N. S. 166; *Imperial Gas Co. v. Broadbent*, 7 H. L. 612.

² Kerr on Injunctions, p. 165; *A.-G. v. Nicholl*, 16 Ves. 338; 10 R. R. 186; *A.-G. v. Sheffield*, 3 D. M. & G. 319; *Wilson v. Tinnend*, 1 Drew. & Sm. 329.

³ Kerr on Injunctions, pp. 48—51, 638, 646; *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *A.-G. v. Birmingham*, 4 K. & J. 547.

⁴ *Lawndes v. Bettie*, 33 L. J., Ch. 451.

⁵ *Pennington v. Brinsop*, 5 Ch. Div.

769; *Clowes v. Staffordshire Water Co.*, L. R., 8 Ch. 125, 143; *Rochdale Canal v. Radcliffe*, 18 Q. B. 287.

⁶ *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 697; *Goldamid v. Tunbridge Wells*, L. R., 1 Ch. 349; *Crossley v. Lightowler*, L. R., 2 Ch. 478; *Harrop v. Hirst*, L. R., 4 Ex. 43. An injunction will be granted in the absence of proof of substantial damage, on the ground that the defendants by their pleading claimed a right to continue doing that which the Court held they were not entitled to do. In an action by a sanitary authority to restrain the sanitary authority of a neighbouring district from authorizing or directing sewage from their district

that the damage complained of is too trivial,¹ or where there is a doubt as to whether damage will accrue, an injunction will be refused, and the defendant will be left to his remedy at law,² but where the right and its invasion are clearly established an injunction will be granted without an issue at law being directed.³ In certain cases, notwithstanding the want of direct evidence of injury, the Court, to prevent a possible mischief, will grant an injunction and give the plaintiff leave to bring an action.⁴ The right to an injunction may be lost by negligence.⁵ The Court will also interfere by injunction to prevent bodies possessing Parliamentary powers from exceeding or abusing those powers, it being a principle of law that persons interfering with the property of others by Act of Parliament are strictly tied down to the limits of the powers granted by the Act.⁶ Where the

to flow into the sewers of the plaintiffs, the Court granted an injunction as to the future, but refused to grant a mandatory injunction to compel the stopping up of existing drains: (1) because to do so would cause serious inconvenience to the district; and (2) because it is doubtful whether a local board have power to stop up drains which they have once authorized to be connected with their sewers. And, inasmuch as the injunction granted applied only to the future, the Court refused to suspend its operation. *A.-G. v. Acton Local Board*, 22 Ch. D. 221; 52 L. J., Ch. 108; 47 L. T. 510; see also *Metropolitan Board of Works v. London and N. W. Rly.*, 17 Ch. D. 246, *ante*, pp. 164—188.

¹ *Llandudno Urban District Council*, (1899) 2 Ch. 705.

² *Edleston v. Crossley*, 18 L. T. 15.

³ *Ashworth v. Brown*, 10 Ir. Ch. R. 421. In *Daly v. Murray*, L. R., 17 Ir., 185, 196, lands adjoining the sea shore were granted, by a patent of Charles II., to the predecessor in title of the plaintiff D. The patent did not expressly grant the foreshore, but from the year 1806 downwards the patentee's representatives were proved to have constantly exercised acts of ownership over it, and their title had from time to time been recognized by their adjacent tenants and others in the locality. They had also, at various times between 1849 and 1874, obtained convictions at petty sessions against trespassers for removing the sand and seaweed. In 1882 the present defendants—twenty in number, some of whom had been among the parties so convicted—claiming an

immemorial right as licensees of the Crown, organized a series of trespasses on the premises, carrying off the seaweed, &c. D. then brought an action against them and the Attorney-General, seeking an injunction, and to have his possession quieted. An order made on the usual summons to fix the mode of trial directed that the cause should be heard before the judge alone, and the evidence given by affidavit, and this order was unappealed from. The cause having come on for hearing accordingly, Chatterton, V.-C., granted the relief sought. The Attorney-General acquiesced in the decision, but the other defendants having appealed, and contending that the plaintiffs' title should have been first established by the verdict of a jury:—*Held*, by the Court of Appeal (affirming the decision below), that the previous verdict of a jury in the plaintiffs' favour was not necessary in such a case, and that the circumstances fully justified the relief that had been granted. See *Tenham v. Herbert*, 2 Atk. 483; *York Corporation v. Pilkington*, 1 Atk. 282.

⁴ *Cloves v. Beck*, 20 L. J., Ch. 505; see *Bradbury v. Manchester, S. and L. Rly.*, 15 Jur. 1167.

⁵ *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Rochdale Canal v. King*, 20 L. J., Ch. 675; 2 Sim., N. S. 78; *Shand v. Henderson*, 2 Dow, H. L. C. 519; 14 R. R. 202; and cases in note 1, p. 303, *ante*.

⁶ *Oldaker v. Hunt*, 19 Beav. 425, and cases *ante*, pp. 171 *et seq.*, 268 *et seq.*; *Goodson v. Richardson*, L. R., 9 Ch. 221. A local board under the Public Health Act, 1875, causing a nuisance by any act

legislature is of opinion that certain acts will produce injury it is enough, and active injury need not be proved.¹

If the effect of granting an injunction would have the effect of inflicting serious damage upon the defendant, without restoring or tending to restore the plaintiff to the position in which he originally stood, or doing him any real practical good, or if the mischief complained of can be fully and adequately compensated by a pecuniary sum, an injunction will not issue.² If, on the other hand, the mischief complained of is of so material a nature that it cannot be properly, fully and adequately compensated by a pecuniary sum, and the granting an injunction will restore or tend to restore the parties to the position in which they formerly stood, it is the duty of the Court to interfere by perpetual injunction, notwithstanding the serious damage caused thereby to the defendant.³

The Court will not hold its hand upon the ground of a decision being appealed from, unless it has some doubt of the justice of that decision.⁴

The Court will not interfere by injunction in a case of merely prospective injury; but although the fact of prospective nuisance is not of itself a ground for the interference of the Court,⁵ yet if some degree of present nuisance exists, the Court will take into account its probable continuance and increase.⁶

Where the plaintiff has proved a right to an injunction, it is no part of the duty of the Court to inquire in what way the

Prospective injury.

No part of the duty of

which, independently of the statute, would have given a cause of action to any person, may be liable in damages, or be restrained by injunction, unless they can show a justification under the powers of the statute. But if a local board do not act themselves so as to cause a nuisance, but neglect to perform their duty of providing a satisfactory and healthy system of drainage, it is no ground of action by an individual for damages or an injunction, but the remedy is by prerogative writ of mandamus; and *semble*, this jurisdiction, notwithstanding the 25th section of the *Judicature Act*, 1873, ought not to be exercised except by the Queen's Bench Division. *Glossop v. Helston and Isleworth Local Board*, 12 Ch. D. 102; see *A.-G. v. Dorking Union*, 20 Ch. D. 595; *A.-G. v. Acton Local Board*, 22 Ch. D. 221; 52 L. J., Ch. 108; 47 L. T. 510; *Peebles v. Onwald-whistle District Council*, (1897) 1 Q. B.

384, *ante*, p. 178.

¹ *A.-G. v. Cockermouth*, L. R., 18 Eq. 172.

² *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Bankart v. Houghton*, 27 Beav. 431.

³ *Pennington v. Brinsop*, 5 Ch. D. 769; *A.-G. v. Birmingham*, 4 K. & J. 328; *Spokes v. Banbury*, L. R., 1 Eq. 42; *Wood v. Sutcliffe*, 2 Sim., N. S. 166; *Bankart v. Houghton*, 27 Beav. 431; *A.-G. v. Bradford*, L. R., 2 Eq. 71.

⁴ *A.-G. v. Bradford*, L. R., 2 Eq. 71.

⁵ *A.-G. v. Kingston*, 13 W. R. 888.

⁶ *Goldsmith v. Tunbridge*, L. R., 1 Eq. 349; *A.-G. v. Sheffield*, 3 D. M. & G. 304; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 39 L. J., Ch. 129; *Elliott v. North Eastern Ry.*, 10 H. L. 333; *A.-G. v. Hackney*, L. R., 20 Eq. 631; *Earl Ripon v. Hobart*, 3 M. & K. 169; 41 R. R. 40; *Cator v. Lewisham*, 11 Jur. 340; *Elwell v. Crowther*, 31 Beav. 163.

the Courts to inquire in what way nuisances may be removed.

defendant can best remove the nuisance. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; and it is the duty of the defendant to find his way out of the difficulty, whatever the inconvenience and expense he may be put to. Where the difficulty of removing the injury is great, the Court will suspend the injunction for a time to render its removal possible.¹ Where an injunction was granted to restrain defendants from pouring sewage into a river, and execution of the order was stayed till July 1st, and the defendants did not subsequently to July 1st stop the nuisance, alleging that they had not yet found a way of deodorizing it, and that compliance with the order was physically impossible; it was held that this was a gross and wilful contempt of Court, and sequestration was ordered to issue.² In cases, however, where important public interests are involved the Court will protect the private rights of individuals, but will at the same time have regard to the nature and extent of the injury and nuisance, and to the balance of inconvenience.³

Injunction to restrain diversion and obstruction of water.

The Courts will grant injunctions to restrain the diversion and obstruction of water in a natural stream; and though merely nominal damages may have been recovered for the diversion, the Court will interfere and vindicate the right by perpetual injunction, if the act complained of will cause irreparable mischief or permanent injury, or would have the effect of destroying a right,⁴ or is calculated to found a claim which may ripen into a right.⁵ If necessary the injunction will be in a mandatory form.⁶

Pollution.

So the Courts will restrain the fouling and pollution of water to the injury of a riparian owner, even where the damage is only nominal, upon the ground of the inconvenience of leaving the parties to repeated and successive actions for damages;⁷ but it is

¹ *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Halifax*, 39 L. J., Ch. 129; *Pennington v. Brinsop*, 5 Ch. D. 769; *A.-G. v. Birmingham*, 4 K. & J. 328.

² *Spokes v. Banbury Board of Health*, L. R., 1 Eq. 42.

³ *Lillywhite v. Trimmer*, 36 L. J., Ch. 525; 16 L. T. 318; and cases *ante*, pp. 164 *et seq.*

⁴ *Swindon Water Co. v. Wilts and Berks Canal*, L. R., 7 H. L. 697; *Grand Junction Canal v. Shugar*, L. R., 6 Ch. 483; *A.-G. v. Great*

Eastern Rly., L. R., 6 Ch. 577; *Elwell v. Crowther*, 31 Beav. 163; *Rochdale Canal v. King*, 2 Sim., N. S. 79; *Tipping v. Eckersley*, 2 K. & J. 264; *Robinson v. Lord Byron*, 1 Bro., C. C. 588; *Weller v. Smeaton*, 1 Bro., C. C. 572.

⁵ *Young v. Bankier Distillery Co.* (1893) App. Cas. 691; 69 L. T. 853—H. L. (Sc.).

⁶ *Harrop v. Hirst*, L. R., 4 Ex. 43.

⁷ *Pennington v. Brinsop*, 5 Ch. D. 769; *Clowes v. Staffordshire*, L. R., 8 Ch. 125.

right, in an order for an injunction, to insert the words "to the injury of the plaintiff," to prevent the authority of the Court being invoked for trivial reasons.¹

The Courts will not grant an injunction unless some perceptible pollution exists; and in the case of *A.-G. v. Cockermouth*,² Jessel, M. R., refused to grant an injunction at the suit of a local board to restrain the defendants from discharging sewage into a stream eight miles above the intake of the plaintiffs' waterworks, the evidence showing that chemical analysis failed to detect any pollution in the water at the intake of the waterworks, though it was polluted at the point of discharge. In the same case, however, the Master of the Rolls granted an injunction at the suit of the Attorney-General, on the ground that *The Local Government Acts*, 1858 and 1861, rendered it illegal for the defendants to discharge the sewage by an outfall out of their district, so as to affect or deteriorate the water at the point of discharge.

In *Weeks v. Howard*,³ Wood, V.-C., refused to grant an injunction to restrain the defendant from draining the water out of a gravel pit, which water the plaintiff alleged, being muddy,⁴ hindered the growth of his watercresses, on the ground that the defendant had as much right to use the stream for such discharge as the plaintiff had to grow his watercresses there.

Where actual substantial damage is shown, the Courts will interfere by injunction to prevent its continuance.⁵

In granting injunctions to restrain pollution by sewage matter, the practice is to grant an immediate injunction restraining any new communications with the river; but, as to existing drains, to suspend the operation of the order for a time to enable the defendants to comply with the order, by altering their works.⁶

In the case of injury to riparian rights, the Courts will not,

¹ *Lingwood v. Stowmarket*, L. R., 1 Eq. 77. For form of order, see *ibid.* 336.

² L. R., 18 Eq. 172.

³ 10 W. R. 567.

⁴ Making water muddy is not pollution. See *Taylor v. Bennet*, 7 C. & P. 329; 39 & 40 Vict. c. 75, s. 20. See *ante*, pp. 175 *et seq.*

⁵ *A.-G. v. Leeds*, L. R., 5 Ch. 589; *Crosley v. Lightowler*, L. R., 2 Ch. 418; *Goldamid v. Tunbridge*, L. R., 1 Ch. 349; 35 L. J. Ch. 382; 14 L. T. 154; *A.-G. v. Birmingham*, 4 K. &

J. 528; *Bidder v. Croydon*, 6 L. T., N. S. 778; *A.-G. v. Luton*, 2 Jur., N. S. 180; *Manchester v. Worksop*, 23 Beav. 198; *Wood v. Sutcliffe*, 2 Sim., N. S. 163; *Tipping v. Eckersley*, 2 K. & J. 264; *Oldaker v. Hunt*, 6 D., M. & G. 376.

⁶ *Goldamid v. Tunbridge*, L. R., 1 Ch. 349; *A.-G. v. Colney Hatch*, L. R., 4 Ch. 146; *A.-G. v. Leeds*, L. R., 5 Ch. 583; *A.-G. v. Halifax*, 17 W. R. 1088; *A.-G. v. Birmingham*, 19 W. R. 561; *Pennington v. Brinsop*, 5 Ch. D. 769; and *ante*, pp. 164 *et seq.*

except in special cases, award damages in lieu of an injunction.¹ The injunction may be in a mandatory form.²

Purpresture
and public
nuisance to
navigable
rivers.

Any invasion of the right of the Crown to the bed of the sea or navigable river is a purpresture, and may be restrained by injunction at the suit of the Attorney-General, whether it be a nuisance or not. If the act complained of be merely a trespass on the property of the Crown, and not a nuisance to the navigation, the Court will generally direct an inquiry, whether it is more beneficial to the Crown to abate the purpresture, or to suffer it to remain. But if it be also a public nuisance this cannot be done, for the Crown cannot sanction a public nuisance.³ Erections on the bed of navigable rivers are not necessarily nuisances, but if they obstruct the navigation they may be abated by information and injunction, or by indictment. The true question in each case is, whether or not a damage accrues to the navigation in the particular locality.⁴

Procedure.

In questions of title to the foreshore between the Crown and a subject the question can be brought before the Court by English information; and it is then a matter for the discretion of the Court whether it will try the question itself or direct an issue before a jury. Such informations were formerly exhibited in the Court of Exchequer on its equity side, which had power to send any questions that might arise upon the title to a trial at law.⁵ The jurisdiction, however, passed from the Exchequer Court to the Exchequer Division, and thence to the King's Bench Division and is not touched by the Judicature Acts (Order LXXII.),⁶ nor by the Crown Suits Acts, 1855—1865, 18 & 19 Vict. c. 90, 24 & 25 Vict. c. 62, 28 & 29 Vict. c. 104;⁷ and the Crown has the same right as formerly to have any question affecting its right decided by this Division only. (See *A.-G. v. Constable*,⁸ where a case by a lord of the manor against

¹ *Pennington v. Brinsop*, 5 Ch. D. 769; Kerr on Injunctions, pp. 39, 40.

² *Spokes v. Banbury*, L. R., 1 Eq. 42; 35 L. J. Ch. 105; 13 L. T. 428; affirmed 13 L. T. 453.

³ *A.-G. v. Terry*, L. R., 9 Ch. 423; *A.-G. v. Lonsdale*, L. R., 7 Eq. 388; *A.-G. v. Johnson*, 2 Wils. Ch. 87; 18 R. R. 156; *Parmeter v. A.-G.*, 10 Price, 412; 24 R. R. 723, 745; *A.-G. v. Parmeter*, 10 Price, 378; 24 R. R. 723, 745; *A.-G. v. Burridge*, 10 Price, 350; 24 R. R. 705; *Bristol Harbour case*, cited 18 Ves. 214; *A.-G. v. Richards*, 2 Anstr. 608; 3 R. R. 632;

see also *Gann v. Free Fishers*, 11 H. L. 292.

⁴ *A.-G. v. Terry*, L. R., 9 Ch. 423; *A.-G. v. Lonsdale*, L. R., 7 Eq. 388; *Reg. v. Betts*, 16 Q. B. 1023; *R. v. Ward*, 4 Ad. & E. 386; 43 R. R. 364.

⁵ *A.-G. of Prince of Wales v. St. Aubyn*, Wightw. 167; 12 R. R. 718 n.; *A.-G. v. Richards*, 2 Anst. 607; 3 R. R. 632.

⁶ *A.-G. v. Emerson*, 10 Q. B. D. 191; *A.-G. v. Reere*, 1 T. L. R. 675.

⁷ *A.-G. v. Newcastle-on-Tyne*, (1897) 5 Q. B. 284.

⁸ 4 Ex. D. 172.

trespassers was removed from the Chancery to the Exchequer Division.)

Any interference with the right of access which a riparian owner has to a navigable river for the purposes of exercising the public right of navigation, is an injury to a right of property, and actionable without proof of special damage, and may be restrained by injunction.¹ It is a question of fact in each case, whether an obstruction in a river amounts to an interference with the right of access to a river frontage.²

Right of access.

An action will lie for the breaking and entering a several or a free fishery.³ The owner of a several fishery may maintain trespass for taking his fish, but the owner of a free fishery has not such a property as to enable him to maintain trespass for taking fish, such fish not being his property until caught.⁴

Fishery.

The obstruction of the passage of fish, as by weirs, is actionable by the owner of a fishery prejudiced thereby.⁵

The pollution of a river, which has the effect of killing or driving away fish, may be restrained by injunction.⁶

In a case where a man, by making an embankment and enclosing the bed of a river, shut out and prevented the tide from reaching a mussel bed and breeding ground, the Court granted an injunction to restrain this encroachment on the principle of irreparable damage to the fishery, without entering on or deciding the question as to the right of ownership in the soil.⁷

For remedies by and against water companies see cases collected *ante*, pp. 816 *et seq.*, and Canal Companies, *ante*, pp. 290 *et seq.*

Water and canal companies.

¹ *Lyon v. Fishmongers' Co.*, 1 App. C. 662; *Rose v. Groves*, 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q. B. 991; *Hubert v. Groves*, 1 Esp., N. P. C. 148; *Fineux v. Hoveden*, Cro. Eliz. 664; *ante* pp. 93 *et seq.*

² *Bell v. Corporation of Quebec*, 41 L. T., N. S. 451 (P. C.).

³ *Holford v. Bailey*, 13 Q. B. 426.

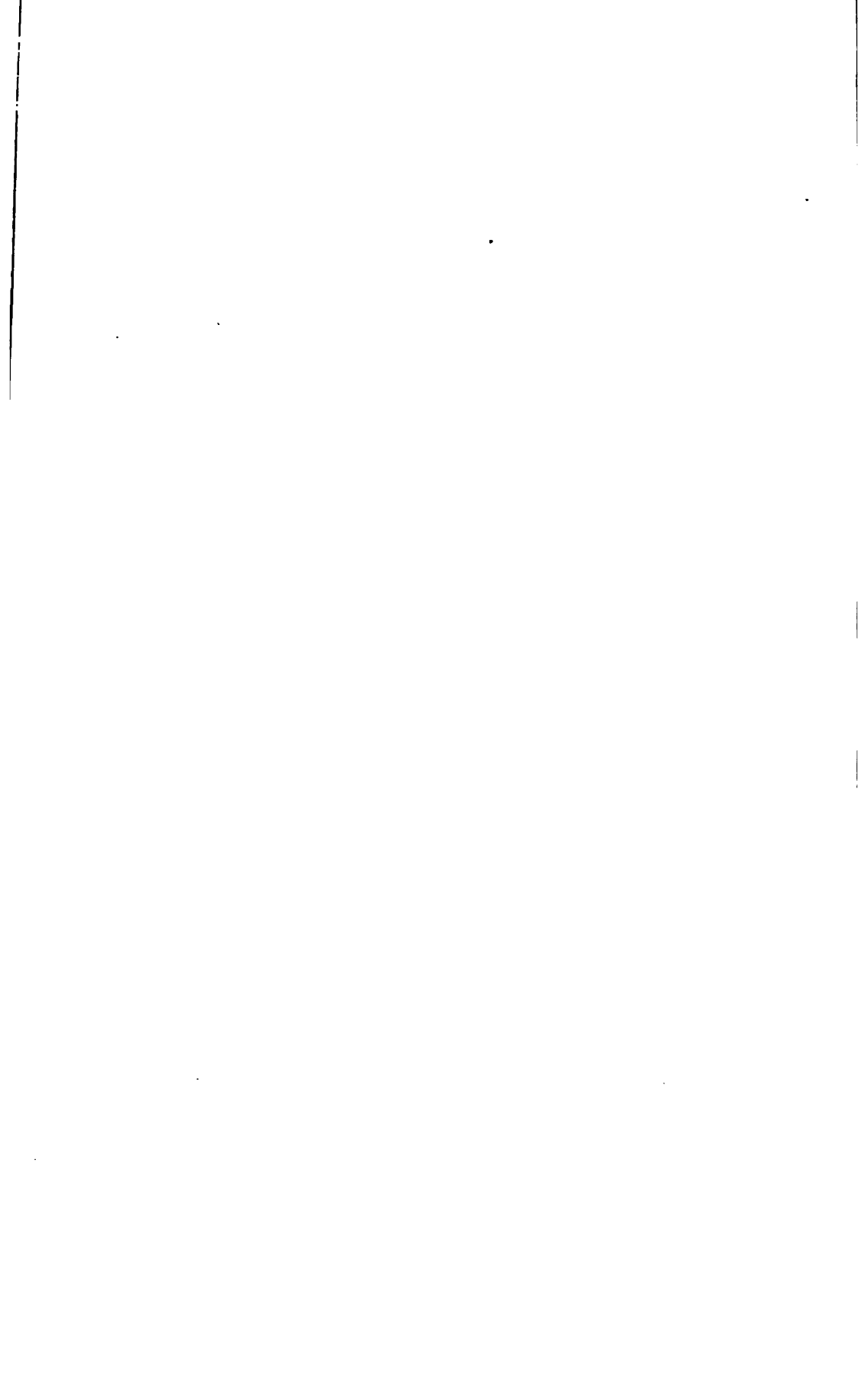
⁴ *Blomfield v. Johnson*, Ir. R., 8 C. L. 68; *Child v. Greenhill*, Cro. Car. 553; *Gipps v. Woollicott*, Skin. 577; *Upton v. Dawkins*, 3 Mod. 97. For proceedings under the Fishery and Poaching Acts, see *ante*, Chap. VI.; and under

the Rivers Pollution Prevention Act, *ante*, Chap. III.

⁵ *Weld v. Hornby*, 7 East, 195; 8 R. R. 608; *Marquis of Donegal v. Hamilton*, 3 Ridg., P. C. 267; *Leconfield v. Lonsdale*, L. R., 5 C. P. 726; 39 L. J., C. P. 305; 23 L. T. 155, per Bovill, C. J.

⁶ *A.-G. v. Birmingham*, 4 K. & J. 528; *A.-G. v. Luton*, 2 Jur., N. S. 181; *Bidder v. Croydon*, 6 L. T., N. S. 778; *Oldaker v. Hunt*, 6 D., M. & G. 376; *Aldred's case*, 9 Rep. 59 a.

⁷ *Bridges v. Highton*, 11 L. T., N. S. 653.



APPENDIX I.

BYE-LAWS FOR THE REGULATION OF THE RIVER THAMES AND THE NAVIGATION THEREOF, AND FOR OTHER PURPOSES.

The Conservators of the River Thames in exercise of the powers and authority vested in them by the Thames Conservancy Act 1894 do make the following Bye-laws that is to say:—

1. All bye-laws rules and orders for the regulation management and improvement of the River Thames and the navigation thereof and of the lands appertaining thereto and for the government good order regulation and registration of vessels in or upon the said river and of persons navigating the same or using the towing paths piers landing places or any of the locks thereof except the bye-laws of the 26th day of August 1893 for the protection preservation and regulation of the fisheries and the Tower Bridge Navigation Bye-laws for the time being in force shall after these present bye-laws have been confirmed by the Board of Trade be and the same are hereby repealed.

Former bye-laws repealed.

2. These bye-laws may be cited as "The Thames Bye-laws 1898" and shall come into operation the day after the same are confirmed by the Board of Trade.

Short title and commencement of operation of bye-laws.

3. These bye-laws shall be applicable to the Thames as defined by the Thames Conservancy Act 1894 and to all places over which the Conservators have jurisdiction to make bye-laws under the provisions of the said Act except where the same or any of them are expressly limited to any particular part or parts of the river or place.

Application of bye-laws.

4. In these bye-laws the words and expressions hereinafter mentioned shall have the meanings hereby assigned to them respectively unless there be something in the subject or context repugnant to such construction viz.:—

Interpretation clause.

The expression "The Thames" or "river" means and includes so much of the Rivers Thames and Isis respectively as are between the town of Cricklade in the County of Wilts and an imaginary straight line drawn from the entrance to Yantlet Creek in the County of Kent to the City Stone opposite to Canvey Island in the County of Essex and so much of the River Kennet as is between the common landing place at Reading in the County of Berks and the River Thames and so much of the River Lee and Bow Creek respectively as are below the south boundary stones in the Lee Conservancy Act 1868 mentioned and all locks cuts and works within the said portions of rivers and creeks. Provided that no dock lock canal or cut existing at the passing of the Thames Conservancy Act 1894 and constructed under the authority of Parliament and belonging to any body corporate established under such authority and no bridge over the River Thames or the River Kennet belonging to or vested in any county council or municipal authority or to or in any railway company shall be deemed to form part of the Thames.

The word "person" includes a corporation whether aggregate or sole.

The word "horse" includes all draught animals.

The word "vessel" includes any ship lighter keel barge launch house-boat pleasure or other boat randan wherry skiff dingey shallop punt canoe yacht raft float boat of timber or craft whatever whether navigated by steam or otherwise.

The word "lighter" means any dumb barge or other like craft for carrying goods or any sailing barge with her mast and gear lowered on deck.

The expression "steam vessel" includes any vessel propelled by machinery.

The expression "steam launch" includes any vessel propelled by steam electricity or other mechanical power not being used solely as a tug or for the carriage of goods and not being certified by the Board of Trade as a passenger steamer to carry two hundred or more passengers.

The expression "pleasure boat" includes any ship launch houseboat boat randan wherry skiff dingey shallop punt canoe or yacht whether navigated by steam or otherwise not being used solely as a tug or for the carriage of goods and not being certified by the Board of Trade as a passenger steamer to carry two hundred or more passengers whether private or for hire.

The expression "pleasure boat for hire" means any pleasure boat let for hire or used or intended to be used for any purpose of profit except such pleasure boats as are let for hire for a period of not less than four weeks continuously to one and the same person.

The expression "private pleasure boat" means any pleasure boat other than a boat for hire and includes such as are let for a period of not less than four weeks continuously to one and the same person.

The expression "steam whistle" includes any efficient sound signal approved by the Conservators.

The word "master" when used in relation to any vessel means any person whether the owner master or other person lawfully or wrongfully having or taking the command charge or management of the vessel for the time being.

The word "harbour-master" means and shall apply to each of the harbour-masters and the deputy harbour-masters and to any person authorised by the Conservators to assist them or to perform the duties of a harbour-master.

The expression "permission of the Conservators" or "consent of the Conservators" means permission or consent of the Conservators in writing signed by the Secretary.

The words "in writing" applied to any document include documents wholly printed or wholly written or partly printed and partly written.

The expression "under way" applied to a vessel means when she is not at anchor or made fast to the shore or aground.

The word "visible" when applied to lights mean visible on a dark night with a clear atmosphere.

The word "Secretary" means the person for the time being acting as Secretary to the Conservators.

The expression "due notice" means a notice in writing given by the Conservators or by any person duly authorised in writing by them to act in their behalf.

The word "certificate" means certificate in writing signed by the Secretary.

The word "officer" means any officer of the Conservators or any person employed by them to carry out the provisions of these bye-laws.

The words "the register" means the register kept by the Conservators in pursuance of sections 138 139 and 140 of the Thames Conservancy Act 1894.

Words importing the masculine gender only shall include females and words importing the singular only shall include the plural.

5. There shall be maintained as far as practicable between London Bridge and the Tower Bridge a navigable passage not less than two hundred feet wide for vessels passing up and down the river.

6. There shall be maintained as far as practicable between the Tower Bridge and Barking Creek a navigable passage not less than three hundred feet wide for vessels passing up and down the river and in all parts of the river where the navigable passage shall be in the stream between tiers of vessels the space for the navigable passage shall be reckoned from the vessel in each of the said tiers nearest to the other or opposite tier.

Navigable
passage for
vessels be-
tween London
Bridge and the
Tower Bridge.
Width of
passage be-
tween the
Tower Bridge
and Barking
Creek.

7. No float or floats or raft or rafts of timber either singly or together exceeding sixty feet in length (excepting timber in one length) and twenty feet in width shall be permitted to go into or pass along any part of the river nor shall any following float or raft of timber go within the distance of three hundred yards of any other such float or raft.

As to floats or rafts of timber.

8. All vessels navigating Gravesend Reach are to keep to the northward of a line defined by a skeleton beacon erected upon the India Arms Wharf and with the high chimney at the Cement Works at Northfleet and all vessels intending to anchor in the Reach are to bring up to the southward of that line. A lantern is placed on the above beacon which shows (at night) a bright light to the northward of the same line and a red light to the southward of it over the anchorage ground. All vessels so anchoring and remaining beyond a period of twenty-four hours are to be moored.

Course of vessels navigating Gravesend Reach.

9. Any vessel slipping or parting from her anchor shall leave a buoy to mark the position of such anchor.

Left anchors to be buoyed.

This bye-law shall not apply to vessels belonging to the Conservators employed in raising a wreck or to any wreck in charge of the Conservators.

10. No anchor shall be allowed to lie or remain in the river outside of the line of the tiers and if any anchor of any vessel shall be so allowed to lie or remain in the river outside of the line of any of the tiers the harbour-master may deliver or cause to be delivered on board the vessel from which such anchor is put out a notice in writing signed by him requiring the master of such vessel forthwith to remove such anchor and if the same be not so removed after the delivery of such notice the harbour-master may remove or cause to be removed such anchor and the expenses of such removal shall be recoverable from the owner or owners or the master of the said vessel to the use of the Conservators as provided by the Thames Conservancy Act 1894.

As to anchors in the stream.

11. No vessel shall navigate or lie in the river with its anchor or anchors a cock bill nor with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the ring shall be awash except during such time as may be necessary for fishing or catting such anchor or anchors or for getting such vessel under way or for bringing up.

Anchors a cock bill or hanging up by a cable.

12. No steam vessel shall be worked navigated or placed upon or anchored or moored in the river within three hundred and sixty feet of Her Majesty's dock-yard or arsenal at Woolwich or of Her Majesty's victualling-yard at Deptford except steam vessels belonging to or employed in the service of Her Majesty her heirs or successors and no vessel shall be anchored in the river within a similar distance of the powder hulk "Thalia" belonging to Her Majesty lying off the said arsenal except for the purpose of loading or discharging explosives out of or into such powder hulk.

Steam vessels not to be navigated or moored near Woolwich Arsenal or Victualling-yard, Deptford.

13. The engine or engines of any steam vessel shall not be set in motion during the time such steam vessel is moored in the river except with the permission of the Conservators or their harbour-master.

No steam vessel while attached to mooring to have engines in motion.

14. The master of every steam vessel navigating the river shall be on one of the paddle boxes or on the bridge of such steam vessel and shall keep or cause to be kept a proper look-out during the whole of the time it is under way and shall remove or cause to be removed any person other than the crew who shall be on the paddle boxes or bridge of such steam vessel.

Master of steam vessel to be on paddle-box bridge.

Above Teddington Lock this bye-law shall apply only to steam vessels used for the carriage of passengers or for purposes of excursions which are not steered from the bows or bridge.

15. No master of any vessel shall take in or discharge ballast unless canvas or tarpauling be affixed below the ballast port and extended down inside the lighter so as to prevent the ballast falling into the river.

Precautions in taking in or discharging ballast.

16. No lighter or sailing barge shall be navigated on the river below Battersea Bridge without having a freeboard of at least fifteen inches such freeboard to be measured amidships and coamings (if any) may be included in such measurement but in no case must the top of the deck or gunwale be less than three inches above the water's edge when such craft is decked and hatched or less than six inches above the water's edge when such craft is open.

Lighters and sailing barges to have fifteen inches free-board.

Penalties for intoxication and use of abusive or indecent language, &c.

As to payment of tonnage dues on vessels not entered at the Customs.

Piers to be lighted or marked.

No vessel to be moored to piers, &c., without permission.

As to advertisements on vessels or river.

Vessels to be navigated singly except when towed.

Not more than six to be towed at one time below Albert Bridge, Chelsea.

Not more than six to be towed at one time between Albert Bridge and Kingston Bridge.

Above Kingston Bridge four only to be towed in a single line.

17. Any person engaged in navigating or employed on or using or being in upon or about the river or the banks or towing paths thereof or any land of the Conservators who shall be intoxicated or make use of obscene scandalous abusive indecent or improper language to any officer of the Conservators whilst employed in the performance of the duties of his office or to the annoyance of any person who shall be in upon or about the river or the banks or towing paths thereof or any land of the Conservators or who shall obstruct any officer of the Conservators in the execution of his duty shall be deemed to have committed a breach of these bye-laws and be liable to the penalty hereinafter mentioned.

18. The master or owner of any vessel entering or leaving the Thames subject to the payment of duties of tonnage and which has not been entered at the office of Her Majesty's Customs and on which the duties of tonnage have not been paid to the receiver there shall furnish to the Conservators for the purpose of registration with full particulars of the name tonnage and owner of such vessel and the port to which she belongs and shall send a return once in every month of the arrival and departure of such vessel during the preceding month to the office of the Conservators and shall pay to the Conservators the duties of tonnage which are then payable for each time of arrival in and departure from the river pursuant to the Thames Conservancy Act 1894.

19. Any pier or jetty in the river or on the shore thereof shall be lighted or marked in such manner as the Conservators may from time to time direct.

20. No vessel shall be moored to or remain at any pier or premises belonging to the Conservators without the permission of the officer in charge of such pier or premises being first obtained and shall move away when ordered by such officer so to do.

21. No advertisement or advertising notice shall be exhibited upon or by means of any vessel or otherwise on or over the river except advertisements or notices by the owner of any vessel on such vessel for the purposes of or in reference to his trade or business.

The expression "owner" in this bye-law shall mean the person whose name appears in the certificate of registration of such vessel.

22. All vessels navigating the river shall be navigated singly and separately except small boats fastened together or towed alongside or astern of other vessels and except vessels towed by steam.

23. Vessels towed by steam navigating the river below the Albert Bridge at Chelsea shall if more than two in number be placed two abreast (except vessels trading on any canal and not exceeding fourteen feet nine inches in width which may be placed three abreast) and not more than six of any such vessels shall be towed together at the same time and no tow of vessels shall exceed in limits the following limits namely:—

Above London Bridge 400 feet

Between London Bridge and the landing place
at the end of Trinity Street Charlton . . . 320 feet

Below the said landing place 400 feet

to be calculated from the stern of the vessel towing to the stern of the aftermost vessel towed.

24. Vessels towed by steam navigating the river between the Albert Bridge at Chelsea and Kingston Bridge may if more than two in number be placed two abreast (except vessels trading on any canal and not exceeding fourteen feet nine inches in width which may be placed three abreast) or may be placed in a single line but not more than six of any such vessels shall be towed together at the same time and the distance between any two of the vessels so towed shall not exceed fifty feet.

25. Vessels towed by steam navigating the river above Kingston Bridge shall be placed in a single line and not more than four such vessels shall be towed together at the same time and the distance between any two of the vessels so towed shall not exceed forty feet.

26. No vessel exceeding three hundred and one feet in length and in the case of a paddle wheel steamer exceeding sixty-five feet in width measured from the outside of the paddle boxes and in the case of other vessels exceeding thirty-six feet in width which is used only or principally for the carriage of passengers or for the purposes of excursions shall be navigated in the river above Blackwall Pier.

For the purposes of this bye-law the length of a vessel shall be deemed to be the length appearing in her Certificate of Registry.

27. Any lighter navigating the river shall when under way have at least one competent man constantly on board for the navigation and management thereof and all such craft exceeding fifty tons but of not more than one hundred and fifty tons burden shall when under way have one man in addition and all such craft exceeding one hundred and fifty tons burden shall when under way have two men in addition on board to assist in the navigation and management of the same with the following exceptions:—When being towed by a steam vessel or when being moved to and fro between any vessels or places a distance not exceeding two hundred yards.

The word "burden" in this bye-law shall have the same meaning as the expression "burden tonnage" defined by the Thames Watermen's and Lightermen's Act, 1893.

No passenger or excursion vessel above three hundred and one feet in length to be navigated above Blackwall.

Lighters above fifty tons burden to have two and above one hundred and fifty tons burden three persons to navigate them.

LIGHTS AND SIGNALS STEERING AND SAILING.

PRELIMINARY.

In obeying and construing the following bye-laws relating to lights and signals and steering and sailing due regard shall be had to all dangers of navigation and of collision and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger.

Nothing in the following bye-laws shall exonerate any vessel or the owner master or crew thereof from the consequences of any neglect to carry lights or signals or to keep a proper look-out or of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

The bye-laws as to lights shall be complied with in all weathers from sunset to sunrise and during such time no other lights which may be mistaken for the lights prescribed by the bye-laws shall be exhibited.

In the following bye-laws every steam vessel which is under sail and not under steam is to be considered a sailing vessel and every vessel under steam whether under sail or not is to be considered a steam vessel.

LIGHTS REQUIRED BETWEEN YANTLET CREEK AND TEDDINGTON LOCK.

28. A steam vessel other than a steam launch when under way shall carry:—

Steamers' lights.

- (a) On or in front of the foremast or if a vessel without a foremast then in the forepart of the vessel at a height above the hull of not less than twenty feet and if the breadth of the vessel exceeds twenty feet then at a height above the hull not less than such breadth so however that the light need not be carried at a greater height above the hull than forty feet a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass so fixed as to throw the light ten points on each side of the vessel, viz.:—from right ahead to two points abaft the beam on either side and of such a character as to be visible at a distance of at least two miles. Provided that steam vessels which navigate both above and below London Bridge shall not be required to carry their lights at a greater height than twelve feet above the hull.

Steam vessels navigating above London Bridge only may carry the white light at any convenient height above and in line with the stem.

Above London Bridge.

- (b) On the starboard side a green light so constructed as to show an

unbroken light over an arc of the horizon of ten points of the compass so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side and of such a character as to be visible at a distance of at least one mile.

- (c) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass so fixed as to throw the light from right ahead to two points abaft the beam on the port side and of such a character as to be visible at a distance of at least one mile.
- (d) The said green and red side lights shall be fitted with inboard screens projecting at least three feet forward from the light so as to prevent these lights from being seen across the bow.
- (e) A steam vessel when towing another vessel shall in addition to her side lights carry two bright white lights in a vertical line one over the other not less than four feet apart. Each of these lights shall be of the same construction and character and shall be carried in the same position as the white light which other steam vessels are required to carry.

Steamers
when towing
to have two
white lights.

Such steam vessel may carry a small white light abaft the funnel or aftermast for the vessel towed to steer by but such light shall not be visible forward of the beam.

Sailing
vessels' lights.

29. A sailing vessel under way and any vessel being towed other than a lighter shall carry the same lights as are prescribed by bye-law 28 for a steam vessel under way with the exception of the white lights mentioned therein which they shall never carry.

Vessels at
anchor or
moored.

30. With the exceptions hereinafter named a vessel under one hundred and fifty feet in length when at anchor or moored shall carry forward where it can best be seen but at a height not exceeding twenty feet above the hull a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile.

A vessel of one hundred and fifty feet or upwards in length when at anchor shall carry in the forward part of the vessel at a height of not less than twenty and not exceeding forty feet above the hull one such light and at or near the stern of the vessel and at such a height that it shall be not less than fifteen feet lower than the forward light another such light.

The exceptions are as follows:—

- (a) Where masted vessels are lying in tiers the outermost off shore masted vessel only of each tier shall carry the riding light.
- (b) Lighters lying at the usual barge moorings in the river above Gravesend are not required to exhibit the riding light.
- (c) Every steam vessel sailing vessel or lighter moored permanently head and stern in the river shall in addition to or in lieu of the riding light exhibit such light or lights as the Conservators shall from time to time order or direct.

The length of a vessel shall be deemed to be the length appearing in her Certificate of Registry.

A vessel of one hundred and fifty feet or upwards aground in or near a fairway shall carry the above light or lights.

Lights for
lighters below
London
Bridge.

31. Every person in charge of a lighter when under way and not in tow shall between sunset and sunrise when below London Bridge have a white light always ready and exhibit the same on the approach of any vessel.

Lights for
lighters in
tow.

32. The person in charge of the sternmost or last of a line of lighters when being towed shall exhibit between sunset and sunrise a white light from the stern of his lighter.

Overtaken
vessels.

33. A vessel below London Bridge which is being overtaken by another vessel shall show from her stern to such other vessel a white light or a flare-up light.

This bye-law shall not apply to boats wherries punts or canoes nor to lighters navigating above Barking Creek.

34. All vessels when employed to mark the positions of wrecks or other obstructions shall exhibit two bright white lights placed horizontally not less than six nor more than twelve feet apart.

Lights to mark positions of wrecks.
Dredgers' lights.

35. Every steam dredger moored in the river shall exhibit three bright white lights from globular lanterns not less than eight inches in diameter the said three lights to be placed in a triangular form at right angles to the keel and to be of sufficient power to be visible at a distance of at least one mile and to be placed not less than six feet apart on the highest part of the framework athwartships.

FOG AND STEAM WHISTLE SIGNALS.

36. All signals prescribed by this bye-law for vessels under way shall be given:—

- (1) By steam vessels on the whistle.
- (2) By sailing vessels and vessels other than lighters towed on the fog-horn.

The words "prolonged blast" used in this bye-law shall mean a blast of from four to six seconds duration.

A steam vessel shall be provided with an efficient whistle sounded by steam or some substitute for steam so placed that the sound may not be intercepted by any obstruction and with an efficient fog-horn to be sounded by mechanical means and also with an efficient bell. A steam launch shall be provided with a similar whistle or other efficient sound signal to be approved by the Conservators. A sailing vessel of twenty tons gross tonnage or upwards shall be provided with a similar fog-horn and bell.

In fog mist falling snow or heavy rain storms whether by day or night the signals described in this bye-law shall be used as follows, viz. :—

- (a) A steam vessel having way upon her shall sound at intervals of not more than two minutes a prolonged blast.
- (b) A steam vessel under way but stopped and having no way upon her shall sound at intervals of not more than two minutes two prolonged blasts with an interval of about one second between them.
- (c) A sailing vessel under way shall sound at intervals of not more than one minute when on the starboard tack one blast when on the port tack two blasts in succession and when with the wind abaft the beam three blasts in succession.
- (d) A vessel when at anchor shall at intervals of not more than one minute ring the bell rapidly for about five seconds.
- (e) A vessel when towing and a vessel under way which is unable to get out of the way of an approaching vessel through being not under command or unable to manoeuvre as required by these bye-laws shall instead of the signals prescribed in sub-sections (a) and (c) of this bye-law at intervals of not more than two minutes sound three blasts in succession, viz. :—one prolonged blast followed by two short blasts. A vessel towed may give this signal and she shall not give any other.

Sailing vessels of less than twenty tons gross tonnage and lighters shall not be obliged to give the above mentioned signals but if they do not they shall make some other efficient sound signal at intervals of not more than one minute.

37. Every vessel shall in a fog mist falling snow or heavy rain storms go at a moderate speed having careful regard to the existing circumstances and conditions.

A steam vessel hearing apparently forward of her beam the fog-signal of a vessel the position of which is not ascertained shall so far as the circumstances of the case admit stop her engines and then navigate with caution until danger of collision is over.

38. All steam and sailing vessels when in the fairway of the river and not under way shall at intervals of about one minute ring the bell rapidly for about five seconds.

When steam vessels are approaching.

3. When two steam vessels are in sight of each other and are approaching with risk of collision the following steam signals shall be intimations of the course they intend to take :—

- (a) One short blast of the steam whistle of about one second's duration to mean—"I am directing my course to starboard."
- (b) Two short blasts of the steam whistle each of about one second's duration to mean—"I am directing my course to port."
- (c) Three short blasts of the steam whistle each of about two seconds duration to mean—"My engines are going full speed astern."

Vessels not under command.

40. When a steam vessel in circumstances other than those mentioned in bye-law 36 is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel or when it is unsafe or impracticable for a steam vessel to keep out of the way of a sailing vessel she shall signify the same by four blasts of the steam whistle in rapid succession each blast to be of about one second's duration.

Vessels coming out of dock.

41. A vessel coming out of dock shall signify the same by a prolonged blast of the steam whistle of not less than four seconds nor more than six seconds duration except in the case of a vessel coming out of the St. Katharine's Dock requiring the bascules of the Tower Bridge to be raised in order to get into position in the river which shall signify the same by a prolonged blast of the steam whistle of not less than five seconds duration followed by three short blasts in rapid succession.

In the case of a vessel not under steam the tug boat in attendance shall make the foregoing signals.

SOUND SIGNALS FOR VESSELS IN SIGHT OF ONE ANOTHER.

42. The words "short blast" used in this bye-law shall mean a blast of about one second's duration.

When vessels are in sight of one another a steam vessel under way in taking any course authorised or required by these bye-laws shall indicate that course by the following signals on her whistle, viz. :—

One short blast to mean "I am directing my course to starboard."

Two short blasts to mean "I am directing my course to port."

Three short blasts to mean "My engines are going full speed astern."

Signals by whistle to be made by ordinary steam whistle or approved sound signal and not to be used for any other purpose.

43. The signals by whistle mentioned in the preceding bye-laws shall not be made by means of a siren or any instrument other than an ordinary steam whistle or other efficient sound signal previously approved by the Conservators and shall not be used on any occasion or for any purpose except those therein mentioned and no other signal by whistle or sound signal shall be made by any vessel.

STEERING AND SAILING.

Sailing vessels approaching.

44. When two sailing vessels are approaching each other so as to involve risk of collision one of them shall keep out of the way of the other, viz. :—

- (a) A vessel which is running free shall keep out of the way of a vessel which is close-hauled.
- (b) A vessel which is close-hauled on the port tack shall keep out of the way of a vessel which is close-hauled on the starboard tack.
- (c) When both are running free with the wind on different sides the vessel which has the wind on the port side shall keep out of the way of the other.
- (d) When both are running free with the wind on the same side the vessel which is to windward shall keep out of the way of the vessel which is to leeward.
- (e) A vessel which has the wind aft shall keep out of the way of the other vessel.

Steam vessels to keep out of the way of sailing vessels.

45. If a sailing vessel and a steam vessel are proceeding in such a direction as to involve risk of collision the steam vessel shall keep out of the way of the sailing vessel.

46. When two steam vessels or two steam launches proceeding in opposite directions the one up and the other down the river are approaching each other so as to involve risk of collision they shall pass port side to port side.

All steam vessels to pass port side to port side.

47. Steam vessels navigating against the tide shall before rounding the following points viz. Coalhouse Point Tilburyness Broadness Stoneness Crayfordness Cold Harbour Point Jennings Point Halfway House Point or Crossness Margaretness or Tripcock Point Bull Point or Gallionsness Hookness and Blackwall Point wait until any other vessels rounding the point with the tide have passed clear.

Steam vessels rounding certain points.

48. Steam vessels and steam launches crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.

Steam vessels crossing the river.

49. Every steam vessel and steam launch when approaching another vessel so as to involve risk of collision shall slacken her speed and shall stop and reverse if necessary.

Steam vessels when approaching each other to slacken speed.

50. Steam vessels and steam launches navigating against the stream above Richmond Lock shall ease and if necessary stop to allow vessels coming down with the stream to pass clear particularly when rounding points or sharp bends in the river.

51. Steam launches navigating above Richmond Lock shall where the channel or depth of water permits be navigated in mid-river.

52. Every vessel overtaking another vessel shall keep out of the way of the overtaken vessel which latter vessel shall keep her course.

Overtaking vessel to keep out of the way.

Every vessel coming up with another vessel from any direction more than two points abaft her beam *i.e.* in such a position with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side lights shall be deemed to be an overtaking vessel and no subsequent alteration of the bearing between the two vessels shall relieve the overtaking vessel of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel cannot always know with certainty whether she is forward or abaft this direction she shall if in doubt assume she is an overtaking vessel and keep out of the way.

53. Where by the above bye-laws one of two vessels is to keep out of the way the other shall keep her course and speed.

LIGHTS REQUIRED ABOVE TEDDINGTON LOCK.

54. Every steam vessel and steam launch shall when navigating in or above Teddington Lock carry and exhibit the following lights and no other—that is to say:—

- (a) On or before the foremast or if there be no foremast on the funnel or on a staff at the bow in either case at a height above the hull of not less than four feet a bright white light so fixed as to throw the light ten points on each side of the vessel viz. from right ahead to two points abaft the beam on either side which light shall in the case of a steam launch registered under the provisions of the Thames Conservancy Act 1894 be behind a glass shade or slide upon which the registered number of such steam launch shall be legibly and conspicuously painted in black figures and in the case of any other vessel the glass shall be perfectly plain and clear.
- (b) On the starboard side a green light so fixed as to throw the light from right ahead to two points abaft the beam.
- (c) On the port side a red light so fixed as to throw the light from right ahead to two points abaft the beam.
- (d) Every such light shall be of such a character as to be visible at a distance of at least one mile.

55. The master of the vessel shall be responsible for the due carrying and exhibiting of such lights and no other.

- Obstructions on towing paths.
56. No person shall in such a way as to interfere with the navigation or towing unload on the bank or towing path of the river any sand gravel timber or other material or place any rubbish boat cart or other article or thing upon such bank or towing path.
- Trespassers on towing paths.
57. No person other than the occupier of land adjoining the towing path shall allow cattle to pasture on the towing path and no person shall ride or drive any horse thereon except when towing a vessel or drive any cart wagon or other vehicle over or upon any part of the towing path unless there be a public right of way for such cart wagon or other vehicle.
- Removing stones, &c.
58. No person shall remove any stone clay or other material from the banks weirs tumbling bays towing paths lands or other works of the Conservators.
- Vessels not to be moored or placed in front of towing paths.
59. No vessel shall be moored to or placed in front of the towing path so as to cause an obstruction to or interference with either the navigation or the use of the towing path.
- Channel not to be obstructed above Richmond Lock.
60. The navigable part of the channel of the river above Richmond Lock shall at all times be kept clear for the passage of vessels navigated thereon and no vessel shall be stopped in the navigable part of the said channel so as to impede or obstruct the free and clear passage of any other vessel and no ryepeck or punt pole shall be left fixed in any part of the bed of the river.
- As to removal of obstructions above Teddington Lock.
61. If any vessel or thing shall be stopped be aground or sunk or placed in any part of the river above Teddington Lock so as to impede or obstruct the free and clear navigation thereof the owner or any person having the care of such vessel or thing shall immediately on the request of any person impeded or obstructed thereby or of any officer of the Conservators remove such impediment or obstruction so as to clear the channel and on the refusal or neglect of such owner or other person to remove such obstruction forthwith any officer of the Conservators may remove or cause the same to be removed and if necessary cause any such vessel to be unloaded and the costs of such removal and unloading shall be paid by the owner of such vessel or thing.
- Vessels not to stop in locks.
62. No vessel shall enter any lock unless there be sufficient water to float and carry such vessel through such lock and the channel or cut leading to or from the same and no vessel shall stop in any lock longer than is necessary for the filling or emptying the lock and passage through the same.
- As to vessels passing locks without paying tolls.
63. If any vessel shall have passed through any lock and the toll for the passage thereof shall not have been duly paid such toll may be demanded and taken at any other lock through which such vessel is to pass before the same be permitted to proceed.
- Passage of vessels through locks.
64. The passage of vessels through locks shall be regulated by the lock keepers in accordance with the directions given from time to time by the Conservators.
- Sails not to be used in locks.
65. No vessel shall enter any lock with sail up nor hoist any sail during the time it continues in the lock.
- Vessels to be made fast in locks.
66. When any vessel used for carrying goods or merchandize steam tug or steam launch enters a lock a rope or chain shall be immediately put out from the bow and stern of such vessel and made fast on shore in order to prevent the vessel from running foul of the gates or works or other vessels in the lock.
- As to towing lines and mooring of vessels.
67. When any vessel is stopped between the towing path and the navigable channel the mast or towing mast or the funnel (if any) shall be lowered so as to permit the towing lines of any other vessel to pass without obstruction and when any vessel shall be moored at any wharf or elsewhere in the river the same shall be securely made fast at both ends thereof and shall be laid as close to and along the side or front of such wharf or mooring place as conveniently may be.
- Ferry boats.
68. No person shall without the consent of the ferryman first obtained take away or use any ferry boat or any pole or tackle belonging to such ferry.
- Injury to banks.
69. No person employed on board any vessel shall without actual necessity

place or hold a pole or boat hook against any bank or towing path or works on the river so as to injure or damage the same.

70. No owner of a towing horse or his servant or driver shall permit or suffer the horse to go out of the towing path or to trespass graze or trample on land adjoining or leave any gate on the towing path or bridge open or leave any swing-bridge open or suffer the towing line to tear away or damage any rail gate post bridge or works.

71. No person shall without the previous consent of the Conservators erect any new buck or weir or drive or affix any pile or stake or make any hedge or plant any willows or osiers in the river.

72. No person without the previous consent of the lock keeper shall use interfere or meddle with the gear at any lock or weir or with any sluice belonging to the Conservators.

73. No vessel shall be towed upon the river from the bank otherwise than from a mast of sufficient height to protect the banks gates and works from injury by the towing line except in places where the strength of the stream renders it necessary that the line should be brought down to the vessel and made fast.

74. No owner or occupier of a mill shall except in case of sudden necessity draw down the water at the mill for the purpose of repairing the works of such mill or for cleansing the mill stream unless he shall have given notice in writing of his intention so to do to the Conservators at their office seven days previously thereto.

75. Two flashes and no more shall be penned for or drawn in a week and those only on such days and at such hours as the Conservators from time to time appoint. Previously to the drawing for such flashes all the flood-gates and sluices and shuttles at all mills and weirs affected thereby shall be close shut in and be kept close shut in till the flash is at best and such flash shall then be drawn and all the flood-gates and sluices and shuttles at the several mills and weirs shall be opened. And all the flood-gates sluices and shuttles at the said mills and weirs shall be kept open to permit such flash to pass without obstruction until the water is drawn down to low water mark if necessary and be kept so for three hours if necessary after the opening or drawing thereof. Immediately after sufficient water has been drawn for the navigation the flood-gates sluices and shuttles shall be close shut in and kept close shut in until the water shall have risen to the low water mark affixed at the adjoining locks.

76. No sewage or any other offensive or injurious matter whether solid or fluid shall be allowed to pass or be put or thrown into the river from any vessel on the river above Teddington Lock.

77. Every houseboat and steam launch used on the river above Teddington Lock shall be provided with such sanitary appliances as shall have been approved by the Conservators or their duly authorised officer and no certificate of registration shall be granted to the owner of any such vessel who does not show upon the form to be furnished to the Conservators when applying for the registration of such vessel that a satisfactory method exists thereon for the disposal of the sewage and other refuse.

78. The preceding bye-laws 76 and 77 shall not apply to the vessels of the Victoria Steam Boat Association Limited or their successors certified by the Board of Trade as passenger steamers to carry three hundred or more passengers whilst such vessels are *bonâ fide* engaged in the business of the said Association or their successors below Molesey Lock.

79. Any vessel being on the river on the occasion of any boat race regatta public procession or launch of a vessel or on any other occasion when large crowds assemble thereon shall not pass thereon so as to obstruct impede or interfere with the boat race regatta procession or launch or endanger the safety of persons assembling on the river or prevent the maintenance of order thereon and the master of every such vessel shall observe the directions of the officer of the Conservators engaged in superintending the execution of this bye-law.

As to trespassers on towing paths and injuries to works.

As to erecting bucks or planting osiers.

Persons not to meddle with sluices.

Mode of towing.

Mill-owners to give notice before drawing down water for repairs.

Flashes.

No sewage, &c. to pass or be put from vessels above Teddington Lock.

Vessels above Teddington Lock to be provided with approved sanitary appliances.

Exception to bye-laws 76 and 77.

Vessels at boat races, regattas, &c.

As to offences
against
decency,
bathing, &c.

80. No person shall while using or while in or upon or about the river or the banks or towing paths thereof or any land of the Conservators do or cause or incite any other person to do any of the acts specified in the following sub-sections of this bye-law.

- (1) Commit any offence against decency or be otherwise disorderly.
- (2) Bathe without proper bathing dress or drawers.
- (3) Bathe or prepare to bathe between the hours of eight in the morning and nine in the evening during the months of June July and August or during the remaining months in the year between the hours of eight in the morning and eight in the evening except at bathing-places authorised by the Conservators and except in the river above Molesey Lock when wearing rowing costume.
- (4) Bathe or prepare to bathe at any place where or between any hours when bathing is for the time being prohibited by the Conservators.
- (5) Do any act which may cause danger to any person or property or occasion a nuisance obstruction or annoyance to the public or to any person.
- (6) Cast or throw into or upon or place or cause or suffer to fall or flow into or upon any of the places specified in this bye-law any sewage, rubbish or other offensive or injurious matter or thing.
- (7) Destroy or injure any flowering or other plant or any shrub vegetation tree wood or underwood.
- (8) Light maintain throw down place or leave any fire or any flaming smouldering or burning substance or any matter or thing in any place where the same may cause danger or damage to property of any kind or annoyance to any person.
- (9) Kill injure take catch or trap or attempt to kill injure take catch or trap any animal or bird or the young of any animal or bird. Provided always that this sub-section shall not extend to prevent any person employed by the Conservators or acting with the consent of the Conservators from killing vermin or shall affect any right of fowling shooting hunting or sporting existing on the 14th day of August 1885.
- (10) Take destroy search for or disturb the nest of any bird.
- (11) Destroy injure disturb or take out of or remove from the nest whether permanently or temporarily the egg of any bird.
- (12) Move injure or deface any notice notice-board work or thing whatsoever the property or in charge of the Conservators or set up by them or with their consent.
- (13) Do any act injuriously affecting the safety or amenity of the river.

Owners or
persons in
charge of
vessels to
obey direc-
tions of
officers of
Conservators.

Houseboats
and steam
launches not
to lie in any
part of the
river marked
off by Con-
servators.

81. The owner or other person in charge of every vessel on the river shall obey and conform to the directions of every officer of the Conservators and of every person for the time being in their employ.

82. No houseboat or steam launch shall lie or loiter in any part of the river from time to time marked off by the Conservators or defined by notice given by the Conservators or by notice-boards set up by them as being a part of the river in which no houseboat or steam launch shall lie or loiter. Provided always that nothing in this bye-law shall prevent any pleasure boat from remaining during any regatta boat race procession or other special occasion at such place and for such length of time as may be sanctioned by the Conservators or their officers.

REGISTRATION.

83. Every pleasure boat used or intended to be used upon the River Thames above Teddington lock shall be registered and marked as in these bye-laws provided.

84. No person shall use or assist or be concerned in using or cause or suffer to be used upon the river above Teddington Lock any pleasure boat

unless such boat shall be registered and marked as in these bye-laws provided.

85. No person shall hire or let for hire or hold out or offer for hiring or suffer or permit to be let for hire any pleasure boat to be used upon the river above Teddington Lock or ply for hire with any pleasure boat upon the river above the said lock unless the same shall be registered and marked as in these bye-laws provided.

86. The preceding bye-laws 83 84 and 85 shall not apply to steam launches required to be registered under the Thames Conservancy Act 1894 nor to any vessel required to be registered under the "Thames Fishery Bye-laws 1893."

87. Every person applying to the Conservators for registration of a houseboat shall furnish to the Conservators in writing upon a form to be obtained at the office of the Conservators Victoria Embankment London E.C. or from such of the officers or servants of the Conservators as may be from time to time supplied with such forms correct information as to the particulars following that is to say:—

(a) The length from head to stern of such houseboat.

(b) The method of disposal of the sewage and other refuse in such houseboat.

(c) The true name and usual residence of the owner thereof.

(1) At the time of making such application for registration the applicant shall pay to the Conservators the sums following that is to say:—

(a) For a houseboat not exceeding thirty feet in length the sum of five pounds.

(b) For a houseboat exceeding thirty feet in length the sum of five pounds and in addition thereto the further sum of two shillings for every complete six inches of length by which such houseboat shall exceed thirty feet in length.

(c) Houseboats kept stationary throughout the year and used only for purposes in connection with boating such as for dressing places or store rooms for boat's gear shall pay 1*l.* 1*s.* annually in lieu of the payments fixed by articles (a) (b) such reduced payment to be in the discretion of the Conservators.

(d) Houseboats kept by boat owners and boat builders to be let for hire shall be exempt from payment of registration fees if neither let nor used during the year.

(2) The Secretary may if he shall think fit before complying with any application for registration of a houseboat require such houseboat to be measured by such person in the employment of the Conservators as he shall think fit.

(3) Upon registration a number shall be appropriated by the Conservators to each houseboat and such number together with the length of such houseboat and the full name and address of the owner thereof and the date of registration shall be entered in the register.

(4) Upon registration of a houseboat there shall be furnished to the person registering the same a certificate containing the name in full and the residence of the owner the register number and the date of such registration and such other particulars as the Conservators shall think fit.

(5) The registration of any certificate for a houseboat shall become void immediately upon the expiration of twelve calendar months from the date of registration but may be renewed in the manner hereinafter mentioned.

(6) Every houseboat registered under these bye-laws shall have legibly and conspicuously painted upon each side thereof either the register number or the name thereof subject to such conditions as the Conservators may require.

88. Every person applying to the Conservators for registration of a private pleasure boat other than a houseboat or steam launch shall furnish to the Conservators in writing upon a form to be obtained as in bye-law 87

mentioned correct information as to the particulars following that is to say:—

- (a) The true name and usual residence of the owner thereof.
- (b) The number of such private pleasure boats belonging to such owner.
- (c) The class to which each of such private pleasure boats belongs as for example skiff or sculling boat pair-oar four-oar eight-oar canoe or punt or otherwise as the case may be.
- (1) At the time of making such application for registration the applicant shall pay to the Conservators the sum of two shillings and sixpence for every boat to be registered.
- (2) Upon registration there shall be appropriated by the Conservators to the owner of every such boat a number to be called the owner's number and such number shall be entered in the register together with the date of registration and shall be appropriated to such person in respect of every such boat which shall be registered in his name.
- (3) Upon registration of every such boat there shall be furnished to the person registering the same a certificate containing the name in full and residence of the registered owner and the owner's number and the date of such registration and such other particulars as the Conservators shall think fit.
- (4) The registration of and certificate for every such boat shall become void immediately upon the expiration of thirty-six calendar months from the date of registration but may be renewed in the manner hereinafter mentioned.
- (5) Every such boat shall have fixed in a conspicuous place inside such boat a plate with the registered number of the owner such plate to be made in accordance with a pattern approved by the Conservators.

89. Every person applying to the Conservators for registration of a pleasure boat for hire other than a houseboat or steam launch shall furnish to the Conservators in writing upon a form to be obtained as in bye-law 87 mentioned correct information as to the particulars following that is to say:—

- (a) The true name and usual residence of the owner thereof.
- (b) The number of such pleasure boats for hire belonging to such owner.
- (c) The class to which each of such boats belongs as for example skiff or sculling boat pair-oar four-oar eight-oar canoe or punt or otherwise as the case may be.
- (1) At the time of making such application for registration the applicant shall pay to the Conservators the sum of two shillings and sixpence for every such boat.
- (2) Upon registration there shall be appropriated by the Conservators to the owner of every such boat a number to be called the owner's number and such number shall be entered in the register together with the date of registration and shall be appropriated to such person in respect of every such boat which shall be registered in his name.
- (3) There shall also at such time be appropriated by the Conservators to every such boat a number to be called the boat's number and a separate number shall be appropriated to every such boat and shall be entered in the register.
- (4) Upon registration of any such boat there shall be furnished to the person registering the same a certificate containing the name in full and the residence of the owner the owner's number the boat's number and the date of such registration and such other particulars as the Conservators think fit.
- (5) The registration of and certificate for every such boat for hire shall become void immediately upon the expiration of thirty-six calendar months from the date of registration but may be renewed in the manner hereinafter mentioned.

(6) Every such boat shall have fixed in a conspicuous position inside such boat the owner's and boat's numbers which numbers shall be in plainly legible black figures on a white ground on a plate of an oval shape not less than four inches by three inches.

90. The members of any rowing club or canoe club may apply to the Conservators to register the club colours badge or mark as the distinctive mark of rowing boats or canoes belonging to such club and by these bye-laws required to be registered.

(1) Every such application shall be in writing and signed by the secretary of such club or other authorised person and shall specify particularly:—

- (a) The name and headquarters of the club.
- (b) The name and description of every rowing boat or canoe used upon the Thames and at the time of such application owned by the club.
- (c) The colours badge or mark used by the club and where proposed to be painted or placed on the rowing boats or canoes or on the oars or paddles thereof.

(2) The Conservators may if they shall think fit and subject to such conditions (if any) as they shall think fit register such club colours badge or mark.

(3) The Conservators may in their absolute discretion refuse any such application whether in respect of any particular club colours badge or mark or in respect of any club generally.

(4) The Conservators may at any time if they shall think fit to do so cancel any such registration.

(5) Every such registration shall if not previously cancelled become void immediately upon the expiration of thirty-six calendar months from the date of registration but may be renewed in the manner hereinafter mentioned.

(6) Every such rowing boat or canoe shall be marked in such manner as the Conservators may from time to time determine.

91. The members of any sailing club may apply to the Conservators to register a burgee as the distinctive mark of sailing boats belonging to members of such club and by these bye-laws required to be registered.

(1) Every such application shall be in writing and signed by the secretary of such club or other person authorised in that behalf and shall specify particularly:—

- (a) The name and address of every member of the club.
- (b) The name and description of every sailing boat used upon the Thames owned by every such member.

(2) The Conservators may if they shall think fit and subject to such conditions (if any) as they shall think fit register such burgee.

(3) The Conservators may in their absolute discretion refuse any such application whether in respect of any particular burgee or in respect of any club generally.

(4) The Conservators may at any time if they shall think fit to do so cancel any such registration.

(5) Every such registration shall if not previously cancelled become void immediately upon the expiration of thirty-six calendar months from the date of registration but may be renewed in the manner hereinafter mentioned.

(6) The owner of every such sailing boat shall also cause such sailing boat to be registered under these bye-laws as a private pleasure boat but such sailing boat shall not be required to be marked otherwise than as is hereinafter specified that is to say:—

(7) Such sailing boat shall be distinguished by flying the registered burgee of the club and by having her name painted horizontally across the stern thereof in white or gilt letters of a black character not less than two-and-a-half inches in length and proportionately thick. Provided always that nothing in this bye-law contained shall exempt the owner of any sailing boat which shall not be registered and marked in accordance therewith from

having the same registered and marked in accordance with such of the provisions of bye-laws 88 and 89 as may be applicable thereto.

92. Every person applying to the Conservators for renewal of the registration or certificate for a pleasure boat shall furnish the same information and make the same payments as are hereinbefore prescribed with reference to the first registration or certificate and every such renewed registration and certificate shall if not previously cancelled have effect for twelve calendar months or for thirty-six calendar months as the case may be from the date thereof and no longer but may again be renewed in like manner.

93. Upon every transfer of the ownership of a pleasure boat registered under these bye-laws the transferor shall and the transferee may forthwith give to the Conservators notice in writing of such transfer and the Conservators shall in either case thereupon without charge grant to such transferee a fresh certificate for the period for which the existing certificate shall be unexpired and shall cause his name and address to be inserted in the register in the place of those of the transferor and until such notice shall have been given the transferor shall for all the purposes of the Thames Conservancy Act 1894 and of these bye-laws and of all other bye-laws rules orders and regulations of the Conservators for the time being in force be deemed to be the owner of such pleasure boat.

(1) Upon every such transfer of ownership the person previously registered as the owner of such pleasure boat shall return to the Conservators at their office Victoria Embankment London E.C. the certificate for the time being in force in respect of such boat.

(2) Immediately upon the granting of a fresh certificate the certificate previously in force in respect of the same boat shall become void.

(3) From and after the granting of a fresh certificate the person to whom the same is granted shall have the boat in respect of which the same is granted marked as if such fresh certificate were the first certificate in respect of such boat.

94. Notwithstanding anything contained in the preceding bye-laws relating to registration the Conservators may if in the case of any particular pleasure boat they shall think fit by writing under the hand of their Secretary require or sanction the marking of any such boat in some manner different from that required under the foregoing bye-laws and in such case such boat shall be marked according to such writing.

95. All names numbers or other distinctive marks or things by these bye-laws required to be placed or kept in upon or about any pleasure boat shall be placed in a conspicuous position and if outside the boat above the water line and shall be kept and maintained by the respective owners of every such boat in a cleanly and plainly distinguishable condition and to the satisfaction of the Conservators or their officers.

(1) No person shall knowingly conceal or cause or suffer to be concealed any name number or other distinctive mark or thing by these bye-laws required to be kept in upon or about any pleasure boat.

(2) No person shall display or cause or suffer to be displayed upon or about any pleasure boat by these bye-laws required to be registered any number other than is required by these bye-laws.

(3) Every certificate of registration when issued shall be subject to the condition that the owner or other person in charge of the vessel to which the same relates shall on demand either produce the certificate or show the registration plate or owner's or vessel's number club colours burgee badge mark or name as the case may be to any officer of the Conservators to any Proctor of the University of Oxford any Marshal or officer acting under such Proctor any officer or constable of the Metropolitan Police and to any police officer or constable acting for any of the counties of Surrey, Berks, Wilts, Gloucester, Oxon, Buckingham or Middlesex or the city of Oxford or any borough the police jurisdiction of which extends to any place upon the river.

TOLLS FOR FERRIES.

96. The following tolls shall be paid for the use of the Conservators' ferry boats above Teddington Lock for every time of passing namely:—

For every horse not engaged in towing taken across by ferry boat the sum of	3d.
For every carriage wagon cart or other vehicle in addition to the toll on the horse	3d.
For every passenger	1d.
For every bicycle tricycle or velocipede	1d.

TOLLS FOR PLEASURE BOATS.

97. Persons in charge of pleasure boats passing through by or over any of the locks on the River Thames shall pay to the lock keepers or other persons authorised to receive tolls the following sums that is to say:—

For every steam launch and passenger steamer	1s. 6d.
Class 1. For every sculling boat pair-oared row-boat and skiff and for every randan canoe punt and dingey	3d.
Class 2. For every four-oared row-boat (other than boats enumerated in Class 1) and sailing boat	6d.
Class 3. For every row-boat shallop over four oars (other than boats enumerated in Classes 1 and 2)	1s. 0d.
For every houseboat under fifty feet in length	1s. 6d.
For every houseboat over fifty feet in length	2s. 6d.

The above charges to be for passing once through by or over a lock and returning on the same day.

In lieu of the above tolls pleasure boats may be registered on payment to the Conservators of the under-mentioned sums and shall in consideration of such payment pass the several locks free of any other charge from the 1st day of January to the 31st day of December in each year.

	Per annum.
	£ s. d.
For every steam launch and passenger steamer not exceeding thirty-five feet in length	5 0 0
For every steam launch and passenger steamer above thirty-five feet in length and not exceeding forty-five	7 10 0
Ditto exceeding forty-five feet in length	10 0 0
For every row-boat of class 1	2 0 0
For every row-boat or sailing boat of class 2	2 10 0
For every row-boat of class 3	3 0 0
For every houseboat not exceeding fifty feet in length	5 0 0
Ditto exceeding fifty feet in length	7 10 0

In computing the tolls every number less than the entire numbers above stated is to be charged as the entire number.

The plate with the registered number thereon is to be fastened on to the boat for which it is issued and is not transferable from one boat to another.

Every vessel carried in or upon another vessel through by or over any lock will be charged as if separately navigated through by or over such lock to the extent of one-third of the above tolls.

98. Any person acting in contravention of any of these bye-laws shall for every such act be liable to a penalty not exceeding £10 and in the case of a continuing offence to a further daily penalty not exceeding the like amount

Penalty for breach of bye-laws.

which said penalties shall be recoverable enforced and applied according to the provisions of the Thames Conservancy Act 1894.

The Common Seal of the Conservators of the River Thames was hereunto affixed by order of the said Conservators in the presence of

JAMES H. GOUGH,
Secretary of the said Conservators.

(L.S.)

7th March 1898.

In pursuance of the powers conferred upon the Board of Trade by the Thames Conservancy Act 1894, the Board of Trade do by this order confirm the Bye-laws made by the Conservators of the River Thames on the 7th day of March 1898, under their Common Seal and the Signature of their Secretary, and which Bye-laws are hereunto annexed.

Dated this twenty-seventh day of April, 1898.

By the Board of Trade,

COURTENAY BOYLE,
Secretary Board of Trade.

WHITEHALL GARDENS, LONDON.

BYE-LAWS FOR THE REGULATION OF THE PASSAGE THROUGH THE TOWER BRIDGE OF SUCH VESSELS AS REQUIRE THE RAISING OF THE BASCULES.

The Conservators of the River Thames in exercise of the powers and authority vested in them by the "Thames Conservancy Act 1894," and of every other authority them hereunto in anywise enabling, do order and direct as follows, that is to say:—


1. The master of every vessel intending to pass up the river through the Tower Bridge, and requiring the bascules to be raised shall, notwithstanding any previous bye-law or regulation, and in addition to the ordinary lights to be carried by such vessel when under way, exhibit before arriving at Cherry Garden pier, and shall continue to exhibit until such vessel shall have passed through the said bridge, the following signals:—
 - (a) By day, viz., between sunrise and sunset, one black ball not less than two feet in diameter, placed in such a position on such vessel where it can best be seen at a height above the hull of not less than 20 feet.
 - (b) By night, viz., between sunset and sunrise, two red lights in globular lanterns of not less than eight inches each in diameter placed vertically six feet apart at a height of not less than twenty feet above the hull and in such a position where they can best be seen, and so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile on a dark night with a clear atmosphere.
2. The master of every vessel intending to pass down the river through the said bridge and requiring the bascules to be raised, shall, notwithstanding any previous bye-law or regulation, and in addition to the ordinary lights to be carried by such vessel, exhibit the signals prescribed by the preceding bye-law until the vessel has passed through the said bridge, but such signals shall not be exhibited until the vessel is ready and in position to proceed through the said bridge.
3. The master of every steam vessel intending to pass up the river through the said bridge, and requiring the bascules to be raised, shall in foggy weather, in addition to the signals prescribed by bye-law 1, give, when passing Cherry Garden pier, a signal by one prolonged

blast of the steam whistle of not less than 5 seconds duration, followed by three short blasts in rapid succession and shall continue to give such signal at moderate intervals until the vessel is in sight of the said bridge.

This signal shall not be used in clear weather.

4. The master of every steam vessel intending to pass down the river through the said bridge, and requiring the bascules to be raised, shall, both in foggy and clear weather, in addition to the signals prescribed by bye-law 1, give the sound signal mentioned in the preceding bye-law when such vessel is ready and in position to proceed through the said bridge.
5. These bye-laws shall be in addition to, and not in substitution for any bye-laws now in force, or which shall hereafter be made by the Conservators under their general powers, and which shall apply to the navigation of the river below London Bridge, and nothing in these bye-laws shall diminish or affect the powers of the Conservators with regard to the regulation of vessels on the river below London Bridge.
6. The word "master" in these bye-laws shall have the same meaning and interpretation as in section 3 of the Thames Conservancy Act 1894.
7. The master of any vessel or any person committing any breach of or in any way infringing any of these bye-laws shall be liable to a penalty of and shall forfeit a sum not exceeding ten pounds, which said penalty may be recovered and enforced summarily, and shall be applied according to the provisions of the Thames Conservancy Act 1894.
8. These bye-laws may be cited as "The Tower Bridge Navigation Bye-laws."

The Common Seal of the Conservators of the River Thames was hereunto affixed by order of the said Conservators in the presence of

JAMES H. GOUGH,
Secretary of the said Conservators. 

Confirmed by order of the Board of Trade this 23rd day of April, 1896.

T. H. W. PELHAM,
Assistant Secretary.

APPENDIX II.

THAMES CONSERVANCY.

BYE-LAWS FOR THE PROTECTION, PRESERVATION, AND REGULATION OF THE FISHERIES IN THE RIVER THAMES, FROM CRICKLADE, IN THE COUNTY OF WILTS, TO YANTLET, IN THE COUNTY OF KENT.—(Order in Council of August, 1893.)

The Conservators of the River Thames in exercise of the powers and authority vested in them by the Thames Conservancy Acts, 1857 and 1864, the Thames Navigation Act, 1866, the Thames Conservancy Act, 1867, the Thames Navigation Act, 1870, the Thames Conservancy Act, 1878, the Thames Act, 1883, and the Thames Preservation Act, 1885, and of every other authority them hereunto in anywise enabling, do order and direct as follows, (that is to say):—

1. These Bye-laws may be cited as "The Thames Fishery Bye-laws 1893."
2. These Bye-laws shall come into operation the day after the same are allowed by Her Majesty in Council.
3. Except when the application of any Bye-law or Bye-laws is expressly limited to any particular part or parts of the River, or to any particular or specified class of fish or mode of fishing, these Bye-laws shall extend and apply to the Rivers Thames and Isis, hereinafter called "The River Thames," as herein defined, and to all creeks, inlets and bends between Teddington Lock in the County of Middlesex, and Yantlet Creek in the County of Kent, so far as the tide flows, and reflows therein at ordinary tides, and to every class of fish and every mode of fishing.

MODES AND INSTRUMENTS OF FISHING.

Upper River.

The following Bye-laws, numbered 4, 5, 6, 7, 8, 9, 10, and 11, shall only apply to so much of the River Thames as is situate above London Bridge.

4. The following instruments, nets, and apparatus shall be the only instruments, nets, and apparatus that may lawfully be used for taking fish:—

1. Rod and Line.
2. A flew or stream net.
3. A seine or draft net.
4. A single blay net.
5. A smelt net.
6. A flounder net.
7. A minnow net.
8. A hand or well net.
9. A landing net.
10. A casting or bait net.
11. Grig Wheels.

And such nets and apparatus shall only be used in the places at the times and in the manner hereinafter prescribed.

5. No rod and line shall be used except when fished with either a natural or artificial bait in a proper manner, and no person shall fish with more than two rods and lines at the same time.

6. No person shall allow any rod and line, or line to which any bait or hook, natural or artificial, is attached, to be drawn or trailed from any vessel on the River Thames.

7. No person shall fish for pike with any device or tackle that does not admit of the pike taken therewith being returned to the water without any serious injury.

8. No Flew or Stream net shall be used of a greater length than sixteen fathoms, measured along the head rope, nor with a mesh of less than three inches from knot to knot, the measurements to be made when the net is wet.

No Seine or Draft net shall be used of a greater length than sixteen fathoms, measured along the head rope, nor with a mesh less than two-and-a-half inches from knot to knot, the measurements in each case to be made when the net is wet.

No Blay net shall be used of a greater length than thirteen fathoms, measured along the head rope, nor with a mesh less than two inches from knot to knot, the measurements in each case to be made when wet.

No Smelt net shall be used of a greater length than sixteen fathoms measured along the head rope, nor with a mesh other than the following: for five fathoms, measured along the head rope from each end thereof, with a mesh not less than one-and-a-quarter inches from knot to knot, and for the remaining six fathoms, measured along the head rope which shall join the two portions of five fathoms, with a mesh not less than one inch, the said measurements to be made in all cases when the net is wet.

No Flounder net shall be used of a greater length than sixteen fathoms, measured along the head rope, or of a greater depth than nine feet or with a mesh of less than two-and-a-half inches from knot to knot, the said measurements to be made in all cases when the net is wet.

No Minnow net shall be used with a greater diameter than three feet in any part of the net.

No Landing net shall be used with a greater diameter than two feet and a greater length than three feet from the ring and the end of the net, nor with a mesh of less than one inch from knot to knot, such measurements to be made when the net is wet.

No Casting or Bait net shall be used exceeding twenty feet in circumference, nor with a mesh of less than one-half inch from knot to knot, nor with a sack or purse of more than six inches in depth when fully extended, the measurements in each case to be made when the net is wet.

9. The following nets and no other may be used by all persons for all fish.

A Minnow net, a Landing net, and a Hand or Well net.

The following nets may not be used except in that part of the River Thames as lies between Isleworth Church Ferry and London Bridge, and except by the persons who used such nets during the year 1892. A list of such persons, with their full names and addresses, is contained in the Schedule hereto:

A Flew or Stream net, a Seine or Draft net, a Blay net, a Smelt net, and a Flounder net.

10. The following nets shall only be used by the following persons, and in the specified way:

A Landing net by a person angling, or by an assistant to a person angling, and as auxiliary to angling with a rod and line, to land fish hooked on a line by the person fishing.

A Minnow net by a person angling or about to angle, or his servant or agent, for the purpose of providing Minnows for bait, to be used for angling in the River Thames.

A Casting or Bait net may only be used by Assistant River Keepers in obtaining bait, to be used by persons for angling in the River Thames.

11. No night hook, night line, nor fixed hook or line shall be used in the River Thames above London Bridge.

MODES AND INSTRUMENTS OF FISHING.

Lower River.

The following Bye-laws, numbered 12, 13, and 14, shall only apply to so much of the River Thames as is situate below London Bridge.

12. The following nets, implements, and apparatus shall be the only implements, nets and apparatus that may be lawfully used for taking fish:—

1. Rod and line,
2. Hand lines fished with bait,
3. Trim-tram or Four-beam nets,
4. Trawl nets,
5. Flounder nets,

6. Stow-boat nets until the 1st day of July, 1895, and such nets and apparatus shall only be used in the places at the times and in the manner hereinafter prescribed.

13. No Trim-tram or Four-beam net shall be used with a weighted beam of a greater length than twenty-one feet, or with a mouth of a greater total circumference than sixty feet, measuring in each of the sides. The netting of any such net shall not be of a greater length than thirty feet from the beam to the extreme end of the cod of the net, and shall not be less than three-quarters of an inch from knot to knot, the measurements to be made when the net is wet.

14. No Trawl net shall be used with a beam of greater length than thirty feet, and the netting of such net shall not be of a greater length than seventy-five feet from the beam, nor with a mesh of less than three-quarters of an inch from knot to knot, the measurements to be made when the net is wet.

GENERAL.

15. No net in any part of the River Thames shall be fixed or attached to the soil, or made stationary in any way, and a net held by any person or persons in a boat or boats, that is or are moored or anchored, shall be deemed to be a fixed net for the purposes of this Bye-law.

16. No person shall put down in any part of the River Thames at the mouth of any brook, creek, river or backwater, communicating with the River Thames, or running into the said River, or at any mill, sluice, race, or branch of the said River, any net or device whatever to stop, catch or hinder any fish, spawn, or fry of fish from coming into, or going out of the River Thames.

17. No spear, gaff, strokehaul, hook, or other instrument of a like nature, or any other device, used in the manner such instruments are usually employed, shall be used in any part of the River Thames. Provided that this Bye-law shall not apply to any person using a gaff as auxiliary to angling for pike with a rod and line.

18. No person shall use any rod and line, hook, wire, snare, or other device, either alone or in connection with a rod and line, or in any other way so as to take fish by means of foul hooking, snatching, or snaring in any part of the River Thames.

19. No wheel, or basket for taking eels or other fish, shall be used in the River Thames except Grig wheels not laid or placed near any dam, or weir, and having a diameter not exceeding six inches, and such wheels shall only be used in such part of the River Thames as lies below the City Stone, Staines.

TIMES IN WHICH THE TAKING OF FISH IS PROHIBITED.

20. No Salmon, or Salmon-trout, may be fished for, taken, or attempted to be taken in the River Thames between the 1st day of September and the

31st day of March following, both inclusive, and no Trout or Char may be fished for, taken, or attempted to be taken in the River Thames, between the 11th day of September and the 31st day of March following, both inclusive.

21. No Smelts may be fished for, taken, or attempted to be taken between the 25th day of March and the 27th day of July following, both inclusive.

22. No Lamperns may be fished for, taken, or attempted to be taken between the 1st day of April and the 24th day of August following, both inclusive.

23. In that part of the River Thames as is situate above London Bridge no person shall fish with or use any rod and line between the 15th day of March and the 15th day of June following, both inclusive, except a rod and line for taking Trout, and fished with an artificial fly or with a spinning or live bait.

24. No fish found in the part of the River Thames above London Bridge may be taken between the 15th day of March and the 15th day of June following, both inclusive, except Trout and Roach, Dace, Gudgeon, Bleak, and Minnows taken as herein provided as bait for Trout.

25. No person shall fish for, take, or attempt to take by any means whatever in that part of the River Thames as lies above the City Stone at Staines, nor from any vessel in that part of the River Thames as lies between the City Stone and London Bridge, any fish between the expiration of the first hour after sunset and the last hour before sunrise.

PLACES IN WHICH THE TAKING OF FISH IS PROHIBITED.

26. The places hereinafter mentioned are places staked and marked out by the Conservators for the preservation and incubation of the fish in the River Thames, that is to say:—

Richmond—From Richmond Bridge upwards, a distance of about 700 yards in length or thereabouts to the building known as Buccleugh House.

Twickenham—From the upper end of the Lawn at Pope's Villa to the Island at Cross Deep, a distance of 400 yards in length or thereabouts.

Kingston—From Broom Hall, Teddington, through the Backwater (the Crowlock) up to the South-Western Railway Bridge at Kingston, a distance of 1,960 yards or thereabouts.

Thames Ditton—From Long Ditton Ferry for 512 yards or thereabouts westwards.

Hampton—From Molesey Lock to the upper end of the Lawn at Garrick Villa, Hampton, a distance of 1,514 yards or thereabouts.

Sunbury—From the "Magpie" Inn for 683 yards or thereabouts to the westward to Sunbury Weir.

Walton—Walton Sale, a length of 250 yards.

Shepperton—The Upper Deep, a distance of 240 yards.

Shepperton—The Lower Deep, a distance of 200 yards.

Weybridge—From Shepperton Lock, along the course of the River to the Weir, a distance of about 830 yards or thereabouts.

Chertsey—From a point 80 yards below the Bridge to the Weir, a distance of 445 yards or thereabouts.

Penton Hook—From the Weir round the Island and up to the Lock at Penton Hook, being a distance of 1,150 yards or thereabouts.

Staines—From a point below the Road Bridge, Staines, to the City Stone, a distance of 210 yards or thereabouts.

27. In any of the above-mentioned places no person shall do or aid or assist in doing any of the following things:—

(a) Take up, remove, injure, or destroy any stake, burr, boat, punt, or any other thing placed for the purpose of impeding fishing or the protection of fish.

(b) Disturb the said preserves or the fish therein, or any spawning bed or

place to which fish resort before, during, or after spawning in any of the said preserves.

- (c) Fish for, take, or attempt to take fish in any of the said preserves by any mode whatsoever except angling with a rod and line. Provided that any duly registered fishermen may use in such preserves grig wheels for taking eels during the time the same may be lawfully used.

SIZES OF FISH.

28. No fish of the species hereinafter mentioned shall be taken in or out of the River Thames, or, having been taken, shall be had in possession or exposed for sale on the River Thames or on the shore thereof, or on any lands adjoining or near to the River, of less than the sizes and dimensions hereinafter respectively mentioned (that is to say):—

Pike or Jack	Extreme length	18 inches
Perch	8 ..
Chub	10 ..
Roach	7 ..
Dace	6 ..
Barbel	16 ..
Trout	16 ..
Grayling	12 ..
Bream	10 ..
Carp	10 ..
Tench	8 ..
Rudd	6 ..
Gudgeon	4 ..
Flounders	7 ..
Smelts	6 ..
Lampersns	7 ..
Soles or Slips	8 ..
Whiting	7 ..
Plaice or Dabs	8 ..

All shrimps to be sifted when alive through a sieve of $\frac{3}{8}$ ths of an inch between the wires, all which wires shall be placed either vertically or horizontally, and no shrimp that will pass through such sieve shall be kept or retained.

But this bye-law shall not apply—

- (a) To any person who takes any undersized fish accidentally and at once returns such fish alive to the water without injury.
- (b) To any roach, dace, gudgeon, bleak or minnows taken for use as bait, provided that except for the purpose of baiting eel-baskets, no person shall be entitled to have in his possession or under his control more than 50 of such fish for use as bait at any one time, or to take by himself, his servants or agents more than 50 of such fish on any day.

29. Any person who shall have in his possession, on, near, or adjoining the River Thames, any fish of less dimensions than those specified in the last preceding bye-law shall be deemed to be guilty of an offence against such bye-law unless he prove to the satisfaction of the Court before which he is tried that he was lawfully in possession of such fish. Provided that this bye-law shall not apply to the person in charge of any boat entering Hadleigh Ray, in order to land at Leigh, fish on board such boat which have been taken outside the limits of the jurisdiction of the Conservators.

GENERAL.

30. Any person following the business of a fisherman on the River Thames, or letting for hire for fishing any boat, punt or other vessel to be used on the River Thames, shall be subject to the following regulations:—

- (a) His name and place of abode shall be duly registered in a book kept

for that purpose by the Secretary to the Conservators of the River Thames at their London office for the time being, which office is now situate at 41, Trinity Square, Tower Hill.

- (b) On the registration of his name he shall pay a fee of one shilling in respect of each boat, punt or other vessel.
- (c) The Secretary shall give to every such person on his registration a certificate thereof, such certificate shall contain the number of every such boat, punt or vessel.
- (d) Such person shall cause to be painted, and keep painted and legible, in characters not less than two inches long, and half-an-inch broad, on the starboard bow and on the port quarter of every such boat, punt or vessel, such number, together with his name and place of abode. Any person neglecting to have such number, name, and address painted on each such boat, punt or vessel and to keep the same so painted, or shall permit the same to be defaced or removed, shall be guilty of an offence against this bye-law, and shall, in addition to any other penalty on conviction for such offence, forfeit his certificate of registration. Provided that this bye-law shall not apply to cases in which any vessel is already marked in accordance with any existing law or regulation in force in the River Thames.

31. No person shall follow the business of a fisherman nor shall let or use any boat, punt or vessel for hire for fishing on that part of the River Thames as is situate above London Bridge without being registered in respect thereof and without having the same marked with the registered number and his name and place of abode, as provided by the last preceding Bye-law.

32. Nothing in these Bye-laws shall prevent any person provided he has the previous consent in writing of the Conservators under their Common Seal from obtaining fish for the purpose of artificial propagation and other scientific purposes from any part of the River Thames, or from having in his possession salmon roe or trout roe for any of these purposes, or from taking or attempting to take salmon or trout when spawning or near the spawning beds.

33. Nothing in these Bye-laws except the provisions relative to the fence season and to the sizes of fish shall take away or abridge the right of the owner or occupier of a private fishery or any person having authority in writing from any such owner or occupier, to do any of the following things within the limits of such private fishery only: that is to fish for or to take or attempt to take fish and eels by means of nets commonly called cast nets and crayfish nets, or by grig or ground wheels for eels, or by night lines or by means of eel bucks or stages, so far only as the same or any of them can be legally used irrespective of these Bye-laws. Provided that on a special license being obtained from the Conservators, in writing, under their Common Seal and not otherwise, such owners or occupiers or persons having authority as aforesaid may, in such private fishery only, take fish by means of a net commonly called a hoop net, having a mesh of not less than two inches from knot to knot when wet, or eight inches all round, and not being more than six yards long, or by means of a net commonly called a drag net, and having a mesh of not less than two inches from knot to knot when wet, or eight inches all round.

34. If any net, engine, apparatus, or device, the use of which is prohibited by these Bye-laws, or if any fish during the time at which the capture of the same is prohibited, or of a size of less than that permitted to be taken by these Bye-laws, is found in the possession or under the control of any person on the River Thames or on the shore thereof, or on any lands adjoining to or near the River Thames, such person shall be deemed guilty of an offence against these Bye-laws, unless he prove to the satisfaction of the Court before which he is tried that the same was legally in his possession or under his control. And if any such net, engine, apparatus, device, or fish has been seized under the provisions of the Thames Acts or any of them or of

these Bye-laws, the Court may either before or after such trial order the same to be destroyed, but without prejudice to the infliction of a penalty or any other remedy against the person charged, or to the rights of such person if such charge shall be dismissed.

35. Any person acting in contravention of the foregoing Bye-laws or any of them, shall for every such act be liable to a penalty not exceeding £5, and may, on the direction of the Court forfeit any net, engine, device, apparatus, or fish, found in his possession or control. Every such penalty shall be recovered in manner prescribed by the Summary Jurisdiction Act, and shall be applied in manner directed by the Thames Acts, 1837 to 1885.

36. In these bye-laws, unless there is something inconsistent or repugnant in the context, the words and expressions hereinafter mentioned shall have the following meanings, that is to say:—

"Person" shall mean any number of persons, or any body of persons corporate or unincorporate.

"Court" shall mean any Court of Summary Jurisdiction, whether consisting of two or more Justices, or of a Stipendiary Magistrate.

"Fishing" includes oyster and shell fishing.

"Fish" includes oysters, shrimps, crabs, lobsters, crayfish and shellfish, and the spat, spawn, brood, ova, or fry of oysters, shrimps, crabs, lobsters, crayfish or fish.

"Vessel" means and includes any ship, lighter, keel, barge, boat, punt, wherry, raft, or craft, or any other kind of vessel navigated by any form of motive power.

"Fisherman" means any person registered as a fisherman or the owner of a boat or vessel used for fishing, or let for hire for fishing on the River Thames.

"Measurement of Nets," except as provided in Bye-law 33, when in these bye-laws the measurement of nets is referred to, such measurement shall be made from knot to knot across the diagonal of the mesh, when such net is wet and the mesh is extended to the utmost.

"River Thames" shall mean and include (1) the Rivers Thames and Isis from Cricklade in the County of Wilts, to Yantlet in the County of Kent. (2) All back-waters, creeks, side channels, bays and inlets connected with or forming part of the said Rivers or either of them, as defined by the Thames Preservation Act, 1885. (3) All creeks, inlets, channels or bends between Teddington Lock in the County of Middlesex, and Yantlet Creek in the County of Kent, so far as the tide flows and reflows therein at ordinary tides.

37. All Rules and Bye-laws now in force for the protection, preservation, and regulation of the Fisheries in the River Thames are repealed from the day when these bye-laws come into operation.

THE SCHEDULE REFERRED TO IN BYE-LAW 9.

George Pearce . . .	The Hollows, Brentford.
George Pearce . . .	Back Lane, Strand-on-the-Green.
Henry Pearce . . .	Ditto.
Charles Pearce . . .	Ditto.
Richard Pearce . . .	Ditto.
Thomas Odell, Sen. . .	Chiswick Ferry.
Thomas Odell, Jun. . .	Ditto.
James Gibson . . .	Spring Gardens, Putney.
Louis Gibson . . .	Ditto.
Charles Gibson . . .	Ditto.
Moses Gibson . . .	Ditto.

INDEX.

ABANDONMENT. See *Extinguishment*.

ABATEMENT,

- of nuisances, 623, 625, 626
 - in the sea and public rivers, 40, 437, 445—447
 - in private streams, 103, 458
- See *Nuisances ; Remedies*.

ACCESS, right of,

- on the sea shore, 40
 - shore of a navigable lake, 41, 97
 - shore of a tidal navigable river, 87, 93, 436, 437, 447
- right to land and cross the shore is incident to, 97
- no right of the public over private lands on the sea shore or navigable rivers for the purpose of bathing, 46
- is a private right to the enjoyment of land, 436, 643
 - the invasion of which may form ground of an action for damages, or of an injunction, 93, 436, 643
- the obstruction of, is actionable without proof of special damage, 94, 447, 643
 - and is an injury to property quite distinct from injury to the public right of navigation, 94, 447, 643
 - whether such obstruction amounts to interference with the right is a question of fact, to be determined by the circumstances of each case, 95, 447, 643
 - See *Sea ; Tidal Navigable River ; Lake*.

ACCRETION,

- property in land formed by, 29—31, 69—76, 101
- if gradual, belongs to owner of land added to, 69, 101
- from the sea, whether natural or artificial, annexed by sect. 27 of 31 & 32 Vict. c. 122, to adjoining parish in proportion to the extent of the common boundary, 15
- and being incorporated therewith for all civil and parochial purposes, rateable to the poor, 15, 595

ACQUIESCENCE, equitable doctrine of, with regard to the acquisition of easements, 208, 209

ACQUIRED RIGHTS OF WATER. See *Easements*.

ACT,

- of God. See *Vis Major*.
- of Parliament. See *Statute*.

ACTION,

- remedy by, for infringements of rights of water, 626, 643. See *Remedies*.
- interference with public rights is the subject of, on proof of special damage, 18, 177, 346, 634

ADMIRALTY, COURT OF,

- criminal jurisdiction of, over English ships on the high seas, 2, 409, 410
- origin and jurisdiction of, 409, n.
- jurisdiction of the admiral transferred to the Central Criminal Court by 4 & 5 Will. 4, c. 36...2, 3, 409
- jurisdiction of, over foreign ships under 41 & 42 Vict. c. 73...8, 9, 409
 - over wreck, 44
- has no cognizance of offences committed on the sea shore forming part of an adjoining county, 15
 - the justices of which have cognizance thereof, 15
- the various duties and powers of, as to ports transferred to the Board of Trade by 25 & 26 Vict. c. 69...52, 411

ALLUVION,

- property in land formed by, in the sea, 29—31
 - in tidal rivers, 69—75
 - in private streams, 101
- See Tidal Navigable River ; Private River.*

AMERICA,

- law of, as to lakes, 107
- riparian ownership, 110

ANCHORAGE,

- the right of, included in the right of navigation, 5, 409, 432—434
- dues for, may be claimed in a port which is a natural roadstead, not artificially formed, 55—57, 433, 444
 - immemorial user of foreshore of tidal rivers by fixing moorings for fishing boats in soil, how supported, 433
 - the right to take, in a port implies a duty in the owner to keep it in repair, 55
 - decisions as to, 565—569
- See Tolls.*
- and beaconage dues, rateability of, 605. *See Rates.*

ARTIFICIAL WATERCOURSE,

- easement of, 108, 109, 112, 248—264
- the most important, viz., canals and sewers, &c., are the creatures of statute, 109
- rights in, are acquired solely by grant or prescription, and are not natural rights, 109, 112, 236, 248—250, 253
 - are incorporeal rights, 112, 205
- effect of grant of, 210—215
- ownership of soil of, 108
- right of fishery in, is *prima facie* incident to the ownership of the soil, 376
- rights in, depend on the character of the watercourse and the circumstances under which it was created, 112, 251, 253, 262
- diversion and obstruction of, 248—264
- pollution of, 161—164, 264, 259, 264
- diversion of a natural stream by, 127, 254
- liability of landowner for escape of water where an artificial has been substituted for a natural watercourse, 145—147
- easement to discharge water by, 205, 254
 - to receive water by, 254, 255
- right of servient owner to compel dominant owner to continue discharge of water by, 255—264
- See Canal ; Watercourse ; Diversion ; Pollution.*

AVON (THE HAMPSHIRE) NAVIGATION ACT, 467, n. (1), 474, n. (3)

AVON (THE WARWICKSHIRE) NAVIGATION ACT, 467, n. (1)

BAILIFF. See *Water Bailiff*.

BALLAST, rubbish, &c.,
 throwing into rivers, prohibition against, under 54 Geo. 3, c. 159...488
 into the Thames, 481
 is a nuisance, and indictable, 438

BANKS,
 of a watercourse, definition of, 61. See *Watercourse*.
 of a tidal navigable river, ownership of, 87
 right of landing and towing on, 87, 419
 of private rivers, property in, 100, 102
 of canals, duty of owners of, to repair, 304
 duty of conservators to repair, 471—478
 See *Tidal Navigable River*; *Private River*; *Canal*.

BARGE, A FLOATING,
 rateability of, 604. See *Rates*.

BATHING,
 no common law right of, in open sea or tidal rivers, 46
 and the public is not justified in passing over private property to
 gain access to the water, 46
 custom of, gives no right to use machines, 46, 48
 laws of decency must be respected in enjoyment of, 46, 48

BEACH. See *Foreshore*.

BEACONAGE AND ANCHORAGE DUES,
 rateability of, 605. See *Rates*.

BED of a watercourse,
 definition of, 58
 of the sea, property in, 1, 8, 15, 24
 of tidal navigable rivers, property in, 65, 82, 87, 89
 of private rivers and streams, property in, 100, 102
 of lakes, property in, 105
 of canals, property in, 277
 See *Sea*; *Tidal Navigable River*; *Private River*; *Canal*.

BOARD OF TRADE,
 powers of, as to ports, 50—53, 411
 rights and interests of the Crown in the foreshores transferred to,
 18
 Arbitrations Act, 1874 (37 & 38 Vict. c. 40), provisions of, as to navigable
 rivers and canals, 495
 canal companies required to report annually to, under Railway and Canal
 Traffic Act, 1888...496, 497
 powers of, as to abandonment of derelict canals, 497
 powers of, as to pilotage authorities, 426

BOATABLE,
 distinction between navigable in American law, 430, n. (2)

L.W.

BOUNDARY,

- of the realm of England, 1, 5—9, 13
- of counties on the sea and tidal rivers, 14, 15, 76
- of parishes on tidal rivers, 15, 76
- of the sea shore, 14
- of grants by the Crown on the sea shore, 23
 - on tidal rivers, 68, 81
- of lands on non-tidal waters, 100, 104
- of lands on large navigable lakes, 105—107
- international rights as to, on rivers bounding two States, 77, n. (1)

BRIDGES.

- are incidents to rights of water, 501
- definition of, 516
- prerogative of Crown as to owners of, similar to that as to owners of ferries, 513
- in early times repair of, was part of the *trinoda necessitas*, as in Roman law, 516
 - and was included in the repair of roads, which fell and is still cast on the parish, 516
 - but repair of bridges has now, for the most part, passed to the counties in which they are situate, 516
- incident to river conservancy, which might prove a nuisance, placed under Commissioners of Sewers by 23 Hen. 8, c. 5...462
- statutory provisions as to, 516—522
 - Magna Charta, 516
 - applies only to making, and not to repairing, 516
 - 22 Hen. 8, c. 5 (The Statute of Bridges), 516, 517, 526, & n. (5)
 - 5 & 6 Will. 4, c. 50 (Highway Act, 1835), 517—519, 526
 - 1 Anne, st. 1, c. 12; 43 Geo. 3, c. 59, and other Acts, 517, n. (2)
 - Malicious Injuries to Property Act (24 & 25 Vict. c. 97), 519
 - 33 & 34 Vict. c. 78; 38 & 39 Vict. c. 55; 40 & 41 Vict. cc. 14 & 77... 520
 - Local Government Act, 1888...520, 521
 - Highways and Bridges Act, 1891...521
- liability of the county to repair, 522—538
 - a bridge of public utility is to be repaired at public expense, 522, 529
 - as a general rule extends to all bridges built by individuals before 43 Geo. 3, c. 59, if the public use them, 522—525, 529—532
 - but if rendered necessary by an authorized interference for private purposes with a highway, the parties so interfering must repair, 518—521, 522—526, 529—532
- what is a public bridge, 525
 - "riding," meaning of, under 22 Hen. 8, c. 5, as to, 526
 - "hundred," meaning of, under 5 & 6 Will. 4, c. 50, as to, 526
 - county only bound to repair bridges over water answering description of *flumen vel cursus aquæ*, 526 and notes
 - a floating bridge, propelled by steam from one side of a river to another is in substance a ferry, and not a bridge, 527
 - sect. 7 of the Locomotive Act does not apply to county bridges, 529
 - a bridge may be a street within the meaning of a statute, 529
 - an indictment does not lie for not repairing a bridge unless it be on a highway, 525, n. (6), 529

BRIDGES—*continued.*

what is a public bridge—*continued.*

highway is a general term including all public ways, 529

a bridge built on a public way without public utility is a nuisance, 529, n. (5)

or if built colourably in an imperfect way so to throw the onus of rebuilding and repair on the county, 529, n. (5)

powers of rural district councils as to, under Local Government Act, 1894...520

persons building bridges under special authority for their own benefit are primarily liable to repair them, 529

but not where special authority to do works for public benefit only, 531

or where it can be shown that the particular liability has been shifted by statute or otherwise on to the public, 531, 532

duties of canal companies to construct and maintain bridges, 306, 307, 592. See *Canals.*

provisions as to construction and management of, under Railway Clauses Act, 1863...490, 491. See *Navigation.*

statutory limitations as to the liability of the county, 533—538

bridges built in counties by individuals, &c., to be erected to satisfaction of the county surveyor, &c., 533, 534, and notes
the county not bound to widen bridges by force of the obligation to repair, 534, 535

justices of county may widen and make commodious bridges or roads at end thereof repairable at expense of county, 535

but this section is permissive and not imperative, 535

county liable both at common law and under 2 Hen. 8, c. 5, to repair approaches to bridges to extent of 300 feet, 536

no liability on a county under Railway Clauses Act, 1845, to repair approaches to a railway bridge over a highway, 537

even though company have lowered level of old highway, 537

where two parts of a bridge are in different counties the liability is divided between the two, 537

in absence of words in 7 & 8 Vict. c. 61, determining boundary between two counties separated by a river, the middle of such river continuously is such boundary, 538

liability to repair *ratione tenuræ*, 538—543

at common law owner of land is ultimately liable though primarily occupier may be, 538

liability of proprietor of a navigation, 539

of infant seised of lands in possession of guardian in socage, 539

right to erect a new bridge, 539

how far covenant to repair binds when damage is done by an extraordinary flood, 540, 541

where a bridge is built by an individual and dedicated to the public the ownership of fabric remains in builder, 541

form of indictment for non-repair, *ratione tenuræ*, 541

liability of tenants of parcels of a manor held by service of tenure or repairing a common bridge or highway, 542

liability to repair must be immemorial, 542

liability to repair foot bridge part of a carriage bridge, 542

what evidence will negative an immemorial liability, 543

evidence of reputation admissible in proof of liability, 543

BRIDGES—continued.

- liability to repair by prescription, 543—545
 - extent of territory chargeable is to be ascertained by usage, 543
 - and in default of usage the larger territory, *i.e.* the county, is liable, 543
 - immemorial custom may be pleaded in defence to an indictment against a county, 544
 - a parish may be indictable, 544
 - so too a hundred, 544
 - or a prescriptive corporation, 544
 - in absence of evidence to the contrary, prescriptive liability to repair extends to 300 feet of the approaches, 545
 - and bridge tolls, rateability of, 619—621. See *Rates*.
 - remedies for non-repair of, 635, 636. See *Remedies*.

BULWARKS, *ripæ muniendæ causâ*,

- right of riparian owners to erect, 82—87, 154—156, 438. See *Riparian Owner*; *Overflow*.

BYE-LAWS,

- for the regulation and navigation of the Thames. *Appendix I.*, p. 645
- for the passage through the Tower Bridge of vessels requiring raising of the bascules. *Appendix I.*, p. 662
- for the protection, preservation, and regulation of the fisheries in the Thames. *Appendix II.*, p. 664
- under the Sea Fisheries Regulation Act, 383
- under Salmon Fishery Acts, when *ultra vires*, 386, n. (6)

CALEDONIAN CANAL ACT, THE, 474, nn. (1), (3)

- CANAL BOATS ACT, 1877 (41 Vict. c. 60), the provisions of, as to canal boats used as dwellings, 498, 499
- registration, authority under, 499
- enforcement of Education Acts, 1870, 1873, 1876...499
- definition of "canal" under, 499
- "canal boat" under, 499

CANALS,

- definition of, 275
 - under the Railway and Canal Traffic Act, 1888...497
 - Explosives Act, 1875...498
 - Canal Boats Act, 1877...499
- how distinguished from a river navigation, 275, 474
- plans for construction of must be deposited with the Admiralty or Board of Trade, 474
- public may only navigate them on payment of tolls, 474
- general statutes regulating traffic and navigation on, 488—500
- are real property, 275
 - and tolls are profits arising from use of the land, 275
- fishery in, 280, 376
- status of proprietors of, defined, 274
- rights of proprietors or undertakers are defined and limited by the Act creating the, 275, 276
- general tenour of Acts incorporating, 276
- ownership of soil vested in undertakers, but only for purposes of Act, 277—280
 - undertakers may have mere possession without being owners, 277
 - but this possession entitles them to maintain trespass, 277

CANALS—*continued.*

ownership of soil vested in undertakers, &c.—*continued.*

undertakers cannot acquire an easement to water for other purposes than those authorized by their Act, 277

and easement to use water to fill a canal ceases when canal ceases to exist, 278

undertakers cannot grant right to take water for uses not sanctioned by their Act, nor can such rights be acquired against them by prescription, 60, 61, 231, n. (8), 235, 278, 279, 298—301

reservations of rights of proprietors on lands adjoining, 216, 278, 279—287

right of support, reservations as to mines, 281—287

as to transport of minerals, 280

of the right to use pleasure boats on, 216, 278

of fishery in, 279, 280, 336

See *Fishery*.

ordinary rules of construction as to conveyances binding on undertakers, 295, 296

powers of undertakers to take leases and give them, 296

liabilities of undertakers, 287—295

for injury to mines, 287—289, 292

as to making compensation under their Acts for injuries, 287—290

at common law for negligence, 290—292, 306

not liable for injuries caused in due execution of their works, 292

vis major, how far an excuse, 293, 294

remedies against undertakers, how enforced, 302, 303

rights of adjoining proprietors to surplus water, 60, 231, n. (8), 235, 278, 279, 297—300

claim against undertakers to have water diverted, 301

undertakers are entitled to ordinary remedies at law, 302

but must use due diligence in bringing actions, 303

duties of undertakers as to navigation, 303—307

duty of, to maintain the navigation, 303, 304, 466, 470

must take reasonable care that navigation is safe so long as it is open, 303, 304, 470

duty of, to remove obstructions, 303, 304, 470

right of, to recover for damage to navigation, 304

works necessary to maintain the navigation, 305

duties as to roads and bridges, 208, 306, 307, 530. See *Bridges*.

power of undertakers to deepen and widen, 305. See *Navigation*.

navigation of, open to public on payment of tolls, 307

by steamers, 307

and on Sundays, 307

powers of undertakers to make bye-laws as to navigation, 307

tolls on, 307, 308, 587—594

regulation of traffic on, provided for by statute, 308

mortgagee of tolls, how far a proprietor, 308

See *Tolls*.

shares in, 308, 309

are not an estate and interest in land, 308

but have been held to be real estate and subject to dower under special Act, 309, n. (1)

are deemed personal property under Canal Acts, 309

probate of will of shareholder, 309

calls for, 308, n. (5)

rateability of, 608—618. See *Rates*.

CANALS—*continued.*

- enactments regulating traffic on, 493—498
- provisions in the Railway and Canal Traffic Act, 1888, as to terminal charges and through rates, 496, 497
- companies must make annual returns to registrar of joint stock companies stating name and place of office, 496
- and to Board of Trade as to capacity of canal for traffic revenue and expenditure, &c., 497
- provisions as to abandonment of derelict canals, 497
- carriage of explosives on, 498
- if used as dwellings must be registered under Canal Boats Acts, 1877—1884...498, 499
- provisions of Education Acts as to children dwelling on, 499

CANALS, INTER-OCEANIC, 77, n. (1)

CANALS PROTECTION (LONDON) ACT, 1898, provisions of, 500

CARRIER,

- powers of a canal company to act as, under 8 & 9 Vict. c. 142, and 10 & 11 Vict. c. 94...493, 494
- definition of, under the Explosives Act, 1875...498
- a common, by water is on the same footing as one on land, 514
 - and does not insure against the irresistible act of nature, 149, 514
- trade profits of a canal company arise from its duties as, 613
- See Ferry; Canal.*

CENTRAL CRIMINAL COURT,

- jurisdiction of Court of Admiralty transferred to, as to the high seas, 2, 3, 409, 410
- and tidal navigable rivers, 76

CHAR, enactments as to protection of, 378, 389, 394, 395, 404. *See Fishery.*

CISTERN, statutory restrictions as to fouling a public or private, 178, 182, n. (2)

COLLISIONS,

- at sea, rule as to, 413, 423, n. (1)
- rules of Admiralty and Common Law Courts now identical as to, 423, n. (1)
- international law as to, 423, n. (1)
- in navigable rivers, 427, 450—453
- local rules as to, 423, n. (1)
- in the Thames. *Appendix I.*, pp. 652, 653

COMMISSIONERS OF SEWERS,

- origin of commissions, 32, 461
- derivation of "sewer," 461
- duties and powers of, 32, 334, 462, 465, 466
 - now vested partly in sanitary authorities, 450, 463, 466
 - partly in inclosure commissioners, 463, 466
 - and in conservancy boards, 464, 466
- may be created by Act of Parliament independently of any general commission, 464
- bodies corporate authorized by legislature to do matters properly cognizant by commissioners are thereby constituted, 467
- saving clauses in modern Acts preserving rights of, 463, 464
- property in embankments or sea-walls not vested in, 33

COMMISSIONERS OF SEWERS—*continued*.

- their powers limited to parts of coast not vested in conservancy or harbour authorities, 33, 34
- acting for a number of land owners, may erect defences if necessary, though injurious to adjoining owners, 39
- liability of landowners under authority of, to keep sea-walls at a certain height, 151, 152
- had powers to remove obstructions in navigable rivers, 465, 466
 - but not to make rivers navigable which were not formerly so, 466
- jurisdiction of, confined to such rivers as are necessary and useful to navigation, 33, n. (1), 466
- See Sea-Wall.*

COMMON OF FISHERY,

- definition of, 342
- generally used to express right of tenants of manor to fish in waters of the lord, 342
- in private waters, 370
- See Fishery.*

COMMON OR PUBLIC FISHERY,

- definition of, 340
- in the high seas, is common to all the world, 340, 344
- in territorial waters, only to the subjects of the realm, 344
- in tidal waters, 344
- See Fishery.*

COMPANIES CLAUSES CONSOLIDATION ACTS, 1845, 1863, 1869,
incorporation of in special Acts of water companies, 309, 310, 312**CONSERVANCY OF NAVIGABLE RIVERS, 83, 460.** *See Navigation, Conservancy of.*

- authorities, definition of, under 40 & 41 Vict. c. 16...411, n. (9)

CONSERVATORS OF RIVERS, 83, 92, 460—500

- are guardians of navigation, 88
- ownership of bed and banks not usually vested in, 89
- not bound at common law to keep navigation open or in repair, 92, 470
 - but bound to take care that persons navigating run no undue danger, 92, 470
- See Navigation.*

CONVENTION

- as to fishery between England and France, 12, 379, 380
- between Great Britain and the United States as to fishery, 12, 379
 - and as to fur seals, 12, 379
- between Great Britain, Holland, Germany, Belgium and Denmark as to police of fisheries, 12, 379
 - and as to liquor traffic in the North Sea, 12, 379, 381
- between Great Britain and Belgium, as to differences between fishermen, 12, 379

CONVEYANCES to canal companies, how construed, 295. *See Canal.***CORNWALL,** custom of tinbounders in, 240, n. (3), 254, n. (5).**CORPORATION,** a prescriptive, indictable for non-repair of a bridge, 544

COUNTY,

- extends to low water-mark, where high seas begin, 13
- creeks and arms of sea within body of a, are subject to law governing inland tidal waters, 13
 - but those not within form part of territorial waters, 13
- question as to what portion of sea is within, must be decided by evidence, 13
- an arm of the sea lying *intra fauces terræ* is or may be within, 13
- sea shore forms part of the body of adjoining, 15
- bed of public navigable river presumably within and subject to justices thereof, 76
- where tidal river forms the boundary between two, boundary line will presumably pass through centre of stream, 77, 538
- liability of, to repair bridges, 522—538. See *Bridges*.

COUNTY COUNCILS,

- powers of, under Local Government Act, 1888, to enforce Rivers Pollution Prevention Acts, 186, n.
- powers of in Scotland under Local Government (Scotland) Act, 188, n. (1)

COUNTY COURTS,

- extent of jurisdiction of, under the County Courts Act, 1888...627, 628. See *Remedies*.
- under the Rivers Pollution Prevention Acts, 186

COVENANTS,

- conferring easements, run with the land, 215
- to build or repair a bridge, how far binding, when damage is caused by extraordinary flood, 540
- See *Bridges*.

CRABS,

- enactments as to protection of, 382, 384

CRAY FISH,

- taking in a private fishery not an offence under the Larceny Act, 405, n. (6)

CREEKS AND ARMS OF THE SEA,

- within body of a county are governed by law relating to inland tidal waters, 13
 - but if not within, form part of the territorial waters of the State, 13
 - and are governed by the laws relating to such waters, 13
- in order to be "navigable" must be affected by ordinary tides, 13, n. (8)
- "*The King's Chambers*," jurisdiction with respect to, 13, n. (6)
- three mile limit with respect to bays under conventions with foreign countries, 13, n. (6)
- grant by Crown of lands bounded by a non-navigable, held to pass soil *ad medium filum aquæ*, 100
- See *Sea*; *Sea Shore*.

CRIMINAL LAW OF ENGLAND,

- foreigners on foreign ships passing within three miles of English coast are subject to, under 41 & 42 Vict. c. 73...8

CROWN,

- title of the, to soil below low water-mark, 5—9
- to mines below low water-mark, as against the subject, 10

CROWN—*continued.*

- questions of title to foreshore between Crown and subject, procedure as to, 642. See *English Information*.
- jurisdiction of, over the territorial waters of the realm, 5—9
 - over "the king chambers," 13, n. (6)
- ownership of soil of sea shore between high and low water-mark, by, 15—29
 - is for the benefit of the public, 15, 19, 40, 72
 - and therefore grants by it are construed strictly, 19
 - but same rules of common sense apply in construing grants from Crown as from a subject, 19
- power of, before 1 Ann. c. 7, to grant portions of shore to a subject, is now prohibited, 19, 81
- prerogative of, to take royal fish and wreck, 18, 44, 46
 - and before Magna Charta, to create a several fishery, on sea shore and tidal waters, 18, 43, 98
- property of, in land formed by alluvion or dereliction, 29, 30
 - and in islands arising in the sea, 31
- is not the universal occupant of unclaimed dry land, 3, n. (7), 66
- rights of, over lands lost by encroachments of the sea, 30
- prerogative of, to protect from inroads of the sea, 31—35
- liability to repair sea defences is not enforceable against, 34
- power of, to prevent destruction of natural barriers from the sea, 34
- rights of, in ports, 50. See *Ports*.
- is conservator of all ports, havens, and arms of the sea in virtue of office of Lord High Admiral, 50, 411, 461. See *Sea ; Sea Shore*.
- rights of, in tidal navigable rivers, 65—67, 73, 103, 110, 346, 461
 - property in soil of, may be granted to a subject by, 78
 - limits of such grants, 81
- rights and interests of, in for-shore, transferred to the Board of Trade, 18
- has no right to soil of rivers above the flow of the tide, 65—67, 99, 346—349
- See *Private River*.
- has no *de jure* right to soil and fisheries of large non-tidal lakes, 66, 105, 348
- grant from, when owner of soil of lake, of free fishery, lands adjacent, &c., not sufficient to pass soil, 107
- See *Lakes*.
- public right of fishery in tidal waters possibly derived from the, 98, 349
- but has now no longer power to create a several fishery on the sea shore or in tidal waters, 19, 43, 98
- See *Fishery*.
- a ferry may be established by grant or licence from, 501
- rights and duties of, as to ferries, 501, 507, 509, 513
- See *Ferry*.
- exemption of, from payment of tolls, 575
 - and of ships of, 576
- See *Tolls*.
- dockyards in occupation of, exempted from payment of rates, or occupied for government purposes, 601
 - but tenants of, holding for private benefit, are not exempt, 601
- See *Rates*.

CUSTOM,

- of nations as to fisheries in the high seas must be respected by other nations, 5, 344
- acquisition of easements by, 239

CUSTOM—*continued.*

evidence of, admissible as to repair of bridges by prescription, 543

See *Bridges.*

evidence of, as to payment of tolls, rules as to, 551—553

See *Tolls.*

DAM. See *Weir ; Mill ; Fishery.*

DECREE,

obstructions to navigation may be restrained by, 437

DEED,

necessary for the creation or assignment of an easement, 206

rules as to construction of, the same in grants by the Crown as in grants by subjects, 19, 81

“DEFINED CHANNEL,”

with respect to percolating water, definition of, 198

DERELICTION, land lost by, property in, 69, 101

DERRICK HULKS, rateability of, 604

See *Rates.*

DISTRESS,

the right of, incident to every toll, 555, 594

and may be made on the thing itself, or any portion of it, 555, 594

power of implies an antecedent right of action, 555

DIVERSION AND ABSTRACTION,

of a natural stream by a riparian owner, 121

must be reasonable, 122

and for uses of his tenement, 123

for supplying a town with water, not a reasonable riparian use, 122

for irrigation, 125

for mills, 126

of a natural stream by artificial means, 127, 237, 238, 254

of subterranean water from a well, 139

of water actually in a well, 196

actually in a surface channel, 196

easement of, 241

is within the Prescription Act, 231, n. (8)

cannot be materially increased, 242

mere alteration, does not destroy, 242

claim to be relieved of water by, 258

continuance of, 301

against a canal company, 301

injunction to restrain, 640

See *Easement ; Remedies ; Riparian Owner.*

DOCKS,

dock companies are bodies possessing statutory powers, 263

See *Statutory Powers, Bodies possessing.*

definition of, 329

ownership of, 329

provisions of Harbours, Docks and Piers Clauses Act, 1847, as to, 329

are usually primarily governed by special Act incorporating them, 329, 330

right to take dues derived entirely from the Act, 329

DOCKS—continued.

- which is regarded in light of a bargain with public, and must be construed strictly, 330
- liability of dock companies, 272—274, 331—336
 - for negligence generally at common law, 331
 - even where tolls are devoted to the maintenance of the works, 272, 273, 331
 - to repair, 334
 - for compensation under Acts to persons injured by their works, 334—336, 530
- dues, 575, 580—586
 - See *Tolls*.
- rateability of, 598—602
 - See *Rates*.

DOMESTIC PURPOSES,

- right of a riparian owner to use water of a stream for, 121
- what are, 121, 316, n. (2)
- taking water for an engine by a railway company is not a, 121
- owners and occupiers entitled to demand a supply of water for, under the Waterworks Clauses Acts, 315, 316. See *Riparian Owner; Water Supply*.

DRAINS,

- right to make for agricultural purposes is unqualified, 188, 189
- no easement to the continuance of the flow of water from such drains can be acquired by prescription, 189, 262
- implied grant of existing, on conveyance of tenement, 216—227. See also *Pollution*.

DRIP, or EAVES-DROPPING, easement of, 143, 262, 264

DUES, dock. See *Docks and Tolls*.

DYNAMITE, use of, to kill fish, is illegal, 397, 404

EASEMENTS OF WATER,

- embrace all acquired rights of water, 204
- definition of, 204
- must be used in connection with a tenement, 204, 234
- are incorporeal rights, 205
- classification of, 205
- how acquired, 205—240
 - by express agreement, 205—209
 - can only be created and assigned by deed, 206
 - equitable doctrine of acquiescence, title to, by, 208
 - extinguishment of, by parol evidence, 209
 - construction and effect of *express grant of*, 210—215
 - extent of, determined by express words of grant, 210
 - benefits of right to an easement run with the land, 215
 - not so rights unconnected with the land, 216
 - no particular words of grant necessary, 216
- by *implied grant*, 216—227
 - on severance of tenements, 217
 - there is an implied grant of necessary easements to grantee but no corresponding reservation, 217
 - except of ways of necessity, 217

EASEMENTS OF WATER—*continued.*

- by *implied grant*—*continued.*
 - reciprocal easements, 226, 227, 255
 - easements not of necessity, words necessary to pass, 227
 - secondary easements, 229
 - the burden of, cannot be increased, 229
 - easements are limited by words of grant or by the extent of user proved, 229, 266
 - a mere alteration does not destroy, 226, 242, 255
- by prescription, 229—240
 - See *Prescription.*
 - by lost grant, 231
 - under the Prescription Act, 231—233
 - what easements are within the Prescription Act, 231, 298—302, 389
 - the common law not superseded by the Act, 233
 - by and against whom claim to, by prescription may be made, 234
 - cannot be claimed when the servient owner is under a disability to grant, 235, 236
- enjoyment must be *nec vi, nec clam, nec precario*, 236, 237, 262
 - and uninterrupted, 237
 - and adverse, 238
 - partial interruption may qualify without destroying, 237, n. (1)
 - claims to, by custom, 239, 240
- particular easements of water, 240—264
 - easement of watercourse, 205
 - See *Watercourse.*
 - easement of diversion and obstruction, 241
 - See *Diversion and Obstruction.*
 - of pollution, 243
 - See *Pollution.*
 - of artificial watercourse, 248
 - See *Artificial Watercourse.*
 - to discharge water and receive flow of water by artificial means, 254, 262
 - right of servient owner to compel dominant owner to continue discharge, 255
 - of drip, or eaves-dropping, 262, 264
 - See *Drip.*
 - to draw water from a well, 205, 231, n. (8), 239
 - to take water to fill a canal, 277, 278
 - to take water from a canal for purposes not sanctioned by Act, cannot be acquired by grant or prescription, 60, 61, 231, n. (8), 235, 278, 279, 297
 - to have water diverted by a canal, 241, 301
 - See *Canal and Diversion.*
- extinguishment of, 264—267
 - if granted by statute for a particular purpose, easement ceases when purpose is accomplished, 265, n. (1)
 - by express release, 265
 - by merger, 265
 - by licence, 209, 265
 - by abandonment, 265
 - by *non-user*, 266
 - by alteration of dominant tenement, 229, 242, 244, 266

EASEMENTS OF WATER—continuedextinguishment of—*continued.*

by encroachment, 242, 244, 267

remedies for disturbance of. *See Remedies.***EAVES-DROPPING**, easement of. *See Drip.***EDUCATION ACTS**, 1870, 1873, 1876, provision to enforce under the Canal Boats Act, 1877...499*See Canal Boats Act.***EELS**, statutory provision as to, 395**EMBANKING** and inclosing evidence of ownership of sea shore, 25, 27, 29.
See Sea Shore.

under Improvement of Land Act, to defend from sea, is "an improvement of land," 463

ENCROACHMENT of sea, land lost by, 30. *See Sea Shore* and *Dereliction.*
extinguishment of easements by. *See Easement.***ENGINES,**

"fixed," 399—403

what are "fixed engines," 402

what are illegal, under Salmon Fisheries Acts, 399, 400

privileged, 403, 404

railway, taking water to supply, is not a "domestic purpose," 121, 124.
*See Fishery.***ENGLISH INFORMATION,**

questions between Crown and subject as to title to foreshore can be brought before Court by, 642

and Court may try question itself, or direct an issue before a jury, 642
jurisdiction now in King's Bench Division, and is not touched by Judicature Acts, 642**ERECTIONS** on bed of a tidal navigable river, when permissible, 82—87, 154—158*See Tidal Navigable River.***ESTUARY,**

power of Secretary of State under Salmon Fishery Acts to define limits of, 385, 386

*See Creek.***EXCHEQUER, COURT OF,**

English informations respecting title to foreshore between Crown and subject formerly exhibited in, 642

but jurisdiction passed to Exchequer Division, and thence to King's Bench Division, 642

EXPIRING Laws Continuance Acts, provisions under, as to salmon fisheries, inspectors and commissions, 389, n. (3)**EXPLOSIVES ACT**, 1875, the, provisions of, as to carriers on canals and navigable rivers, 498

definition of carrier under, 498

canal company, 498

EXTINGUISHMENT OF EASEMENTS. See *Easements*.

FERRY,

- franchise of, an incident to possession of rights relating to water, 501
- definition of, 501, 507, 515
- may be created by Act of Parliament, royal grant or licence, or by prescription, 501
- incidents to the ownership of the franchise of, 501, 502, 515
- the right to take tolls is usually part of privilege of, 502
 - but must be founded on adequate consideration, 502
 - and burden must be reasonable in amount, 502
- rights of action and liabilities of parties entitled to franchise of a, 502—515
 - against parties evading payment of toll, 502, 515
 - for disturbance of franchise by setting a new ferry so as to diminish custom, 502, 503—513
 - owners of, liable to criminal indictment if they wilfully or by neglect of duty obstruct subjects of realm in use of, 502, 513, 514
- description and limits of a, 504—506
 - right to ply on Sundays, under the Watermen's Acts, does not constitute an ancient ferry, 505, 506
 - existence of an ancient, does not preclude persons from using river as highway from or to all places on boats not in a line leading from one terminus to the other, 506—513
 - owner of, is proprietor of a particular species of monopoly for public advantage, 509, 513
 - but has not a grant of exclusive right of carrying by any means whatever, 509
 - but only by means of a ferry, 509
 - conditions of grant from Crown, 509
 - protection of Crown to grantees does not extend to future discoveries of entirely new means of transit superseding a, 510
 - no actions against persons violating rights otherwise than by means of boats, 510
 - how far owners are entitled to compensation for loss arising from creation of new highways, 510, 511
 - prerogative of Crown respecting, similar to that respecting bridges, 513
- liabilities of lessees and owners for injury by negligence, 513, 514
 - common carriers by water on same footing as those by land, 514
 - and do not insure against irresistible acts of nature, 514
 - what constitutes a contract between owners of ferries and passengers, 514
- a floating bridge propelled across a river by steam is not a, 527—529
- saving of legal rights of on the Thames under the Thames Conservancy Act, 1894...483
 - or within the Mutiny Act, 527—529
- tolls, 515
 - alteration of, no answer to an action for disturbance, 514, 515
 - lie in grant and not in tenure, 515
 - an agreement to lease must be under seal, 515
 - "passage" defined, 515
 - the individuals or inhabitants of a particular town may have customary right of passage over a ferry without paying toll, 515
 - rateability of, 606, 607. See *Rates*.

FISH. See *Fishery*.

shell. See *Shell Fish*.

royal. See *Royal Fish*.

FISHERMEN, British have exclusive right of fishing within distance of low water mark on the British coast, 12, 344, 345

FISHERY,

the various rights of, defined, 337

a *territorial* fishery, 337, 363

right of, when not connected with soil is a *profit à prendre*, 337, 338

but not an easement within the Prescription Act, 339

not an interest in land sufficient to give claim to compensation under Land Clauses Consolidation Act, 339

common or public fishery in the sea or tidal waters, 340

a *several* fishery, 340

free fishery, 341, 342

effect of grant of fishery, 342

common of fishery, 342

See *Territorial Fishery*; *Free Fishery*; *Common or Public Fishery*; and *Common of Fishery*.

licence to exercise exclusive right of, must be by deed, 104, 343

effect of licences to fish, 343

in the high seas :

prima facie common to all the world, 2, 5, 344

exclusive right of, how acquired by one nation as against another, 5

customs of other nations as to, must be respected, 5, 344

conventions with foreign states as to, 379

no restrictions on, either as to season or means of catching fish, except as provided in conventions between States, 344, 358, 391, 392, 396

a prescription for a fishery in the sea is bad, 345

in the territorial waters of the realm :

common to all subjects of the realm, 12, 345

who have an exclusive right within three nautical miles of low water mark, 12, 345

conventions with France, Holland, Germany, Belgium and Denmark as to, annexed to the Sea Fisheries Act, 1868...12, 344, 379 regulations as to fishing and boats under, 380

conventions with America, Belgium, Denmark, Holland and Germany as to, 12, 379—381

and with respect to liquor traffic and fur seals, 379—381

provisions of the Sea Fisheries Act as to oyster and mussel beds, 381—384

as to crabs and lobsters, 384

as to herrings, 384

sea fishery districts under the Sea Fisheries Regulation Act, 383

restrictions as to season for taking or mode of capture of sea fish in sea fishery districts, 392

in tidal waters :

public right of, exists *prima facie* in all subjects of the realm, 43, 98, 345

subject to legal restrictions as to season and means of capture, 43, 391, 396

extends to the sea shore between high and low water mark, 43, 345

FISHERY—*continued.*in tidal waters—*continued.*

- and to estuaries and tidal rivers so far as the tide flows and reflows, 98, 345
- does not exist in non-tidal waters which have been made navigable, or been immemorially so, 65, 67, 346, 350
 - or in inland non-tidal navigable lakes, 348
- semble*, depends on proprietorship of bed by Crown, 65—67, 69, 347, 348
- which prior to Magna Charta had right to exclude public and create several fishery, 43, 98, 350
- the Crown cannot now interfere with the right, by grant or charter, 43, 98, 345
- the right is subservient to that of navigation, 43, 99, 359
- includes right of fishing between high and low water mark, and taking shell fish there, 43, 345
- but not of using adjoining land, except by custom, 345, 358
- the public may take all the fish they can by lawful means, 346, 362
- interference with right is indictable and actionable on proof of special damage, 346
- right does not include that of taking royal fish, 346
- right, how affected by change of bed, 69, 70, 71
- a several fishery in, how claimed, 98, 99, 350, 358
- is subject to the public right of navigation, 99
 - by grant, 350
 - by prescription, 350
 - what evidence is necessary to support claim to, by prescription, 350—352
 - as appurtenant to a manor, 340, 358
 - semble*, cannot be claimed as appurtenant to land, 353
 - is a royal franchise, and does not merge on forfeiture, 353, 354
 - effect of grant of, 354—358
 - does not, in absence of other evidence, pass the soil beneath water, 43, 99, 355
 - but grant of *sea grounds*, *oyster layings*, *shores*, and fisheries held to pass it, 355
 - and also grant of several fishery exercised by *kiddles*, 356, 357
 - effect where river changes its course, 357, 358
 - a free fishery in, is a co-extensive right enjoyed by two or more persons, 358
- user of fisheries, 358, 359
- use of soil *per se* not sufficient to support claim for toll from vessels anchoring in limits of fishery, 359
- obstructions to, 359—362
 - weirs obstructing navigation are illegal, unless granted by Crown prior to reign of Edw. I., 359, 360
 - and are indictable, 359, 360
 - so *semble*, if obstructing fishery, 360
 - obstructions to fishery and the passage of fish are actionable by the owners of the fishery, 361
- in private streams, 66, 67, 70, 104, 362—372
 - belongs *prima facie* to the owners of bed *ad medium filum aquæ*, 66, 362
 - as a territorial right, 363
 - where a man possesses land on both sides of a stream he has sole right of, 104, 363

FISHERY—continued.in private streams—*continued.*

- right is vested in occupier of lands, 363
- opposite proprietors are liable to actions of trespass for throwing net or line beyond centre thread, 363
- lord of a manor must make out his claim to right by evidence of his own, as by deed, 104, 364
- lords of manors are *prima facie* entitled to fisheries over waters of the waste, 104, 364
- where right is claimed in another's water, *onus* of proof is on claimant, 365, 366
- claim by the public to fish in private waters cannot exist in law, 66, 366, 367
 - or by custom, 367, 368
- licences to the public to fish are revocable at any time, 368
- several fishery in, apart from ownership of soil, 104, 368—372
 - semble*, grant of, passes the soil by implication, 368—370
 - may be appurtenant to a manor, 368
 - but *semble*, not to a tenement, 368
- free fishery in, 370
 - does not import ownership of soil, 370
- right of fishery in, subordinate to rights of navigation, 371
- obstructions to fishery in, 371
 - statutes prohibiting weirs only relate to navigable rivers, 371
 - so a claim to a weir in private waters may be established by grant or prescription, 371
 - but obstructions to fishery are *prima facie* actionable, 372
 - though not a public nuisance or indictable, 372
 - pollution of a stream, rendering it unfit for fish to live in, is actionable, 372
 - and ground for interference by the Court by injunction, 372
- in lakes and pools, 66, 67, 105—108, 372—377
 - in *small* pools and ponds which are included in one property or manor is *prima facie* in owner thereof, 108, 372, 373
 - where boundary of two properties passes along it, it coincides with the *medium filum*, and fishery follows such line, 105, 373
 - fish are *feræ naturæ*, and cannot be subject of larceny at common law, 373
 - except in small ponds, tanks or stews, 373
- in *large* inland navigable lakes the law as to the right is doubtful, 66, 67, 105—107, 373—376
 - the Crown has no *de jure* right to it, 105, 373—376
 - semble*, the public have no right in such lakes, 108, 373, 376
 - or in the Norfolk broads, which are non-tidal, 376
- grant of free fishery in, held not to pass the soil of the bed, 369, 373
- in canals and artificial waters, 279, 376, 377, 386
 - is *prima facie* incident to the ownership of the soil, 376
 - and canal proprietors, &c., may let it if they think fit, 376
 - reservations of, to land owners, 279
 - is in many cases regulated by the Act incorporating a canal company, and is then dependent on its construction, 376, 377
 - boards of salmon conservators must not injuriously affect canals, &c., 386

FISHERY—*continued.*

- statutory regulations affecting, 377—407
 - general enactments for protection of fish, 377—391
 - special Acts relating to Scotland and Ireland, 378, n. (1)
 - as to salmon, 377, 385—389, 393. See *Salmon Fisheries Acts; Salmon.*
 - as to freshwater fish, 378, 389—391
 - formation of conservancy districts and boards for protection of salmon fisheries, 385—389
 - and of fishery districts for freshwater fish, 389—391, 404
 - as to sea fish, 379—384
 - provisions as to oyster, mussel, and cockle fisheries, 381, 382
 - as to crabs and lobsters, 384
 - as to herrings, 384
 - statutory provisions as to the season during which it is illegal to catch fish, 391—396
 - in the *high seas* and *territorial waters*, 391, 392
 - power of Board of Trade to create sea fishery districts in territorial waters on application of county and borough councils, 383
 - and to appoint local committees who may make bye-laws respecting close time for fishery, 383, 392
 - in inland waters, 393—396
 - as to salmon, 393, 394
 - trout, 394, 395
 - eels, 395
 - lampreys, 395
 - freshwater fish other than trout and char, 395
 - as to the sale, exposure, or purchase for sale of sea fish, 393
 - of salmon, trout, or char, 395, 396
 - of freshwater fish, 395, 396
- as to the means by which it is illegal to catch fish, 396—404
 - oyster beds, disturbance of, 397
 - salmon, disturbance of, 397, 398
 - using dynamite to kill salmon, trout, or other freshwater fish, 397, 398, 404
 - or lime or noxious materials, 397, 398
 - licences, provisions as to, 398, 399
 - obstruction of fish descending a stream, 398
 - using snares, lights, spears, &c., 398
 - size of mesh of net to be used, 398
 - seine or draft nets, 399
 - dams, weirs, and fixed engines, 399—404
 - what dams and weirs are privileged, 400, 403, 404
 - privileged fixed engines, what are, 400—403
 - evidence necessary to support a claim to, 401, 402
 - what is a fixed engine, 402
- as to prevention of poaching fish, 373, 404—407
 - stealing fish in ponds is larceny at common law, 373, 404
 - taking or destroying fish in waters adjoining or belonging to a dwelling-house, 405
 - or in other private waters, 405, 406
 - or in a several fishery in tidal waters, 405, n. (6)
 - what is evidence of a private fishery, 405, n. (6)
 - "adjoining," definition of, 405, n. (3)

FISHERY—continued.

- statutory regulations affecting—*continued.*
 - as to prevention of poaching fish—*continued.*
 - taking or destroying fish, &c.—*continued.*
 - or in other private waters—*continued.*
 - "unlawfully," definition of, 406
 - at night, 405, 406
 - or in the daytime, 405, 406
 - where a *bond fide* claim is set up, 406
 - seizure of nets and tackle, 406
 - maliciously destroying dams of fish ponds, 406
 - or putting lime or other noxious material therein, 406
 - in the Thames, bye-laws of the conservators as to, *Appendix II.*, p. 664
 - rateability of a, 607, 608. See *Rates.*
 - what remedies will lie for infringement of rights of, 643
 - See *Remedies; Trespass.*

FLOODS,

- right of riparian owners to protect their lands from, 39, 154—158
 - is not so extensive in the case of inland waters as in that of the sea, 154. See *Sea Wall; Overflow.*
- proprietors may build bulwarks *ripari muniendæ causâ* to avert, 155, 156
- ordinary and extraordinary channel for waters of, distinguished, 155, 156
- rights of riparian owners to avert ordinary, 154, 155
 - and extraordinary, 157, 158
- an extraordinary, is a common enemy, in providing against which
 - riparian owners may exercise reasonable selfishness, 157
 - to avoid a common danger, 157
- liability for escape and overflow of water, 136—154
- in mines, 138—147. See *Overflow; Mines.*
- duty of railway companies as to building sufficient bridges, 531
- extraordinary, how far an excuse for damage at common law, 147—150, 319, n. (1)
- where liability is imposed by contract or Act of Parliament, 150, 152, 153
- in cases of negligence, 150, 151
- See *Overflow; Vis Major; Riparian Owner.*

FLOTSAM, definition of, 44, n. (11)

FOG SIGNALS,

- rules of the sea as to, 413, n. (1) (Art. 15)
- in navigable rivers, 427
- in the Thames, *Appendix I.*, 651

FOOTBRIDGE, 532, n. (4), 535, 542. See *Bridges.*

FOREIGNERS,

- on English ships are subject to English law, 3, n. (1), 409
- on foreign ships, when subject to English law, 3, 8, 12, 409

FORESHORE,

- of the sea and tidal rivers, 14—49, 405, n. (7), 596
- definition and limits of*, 14, 65
 - comprises only that portion lying between high and low-water mark, at ordinary tides, 14, 68
 - but this line varies as the sea recedes from or encroaches on the land, 14, 68, 69

FORESHORE—*continued.**definition and limits of—continued.*

- land beyond this line is not shore, 14
- though overflowed by high tides, 14
- forms part of body of adjoining county, but not *prima facie* of adjoining parish or manor, 14, 15, 76, 596
- justices of adjoining county have cognizance of offences committed thereon, 15, 76
- whether shore is or is not covered with water, 15
- incorporated by 31 & 32 Vict. c. 122, with adjoining parish for all civil and parochial purposes, 15, 76, 596, 597, n. (1)
- and is rateable to the poor there, 15, 76, 77, 596, 597, n. (1)
- so, too, all artificial or natural accumulations from the sea, 15, 76, 596, 597, n. (1)
- was held to be extra-parochial within the Nuisances Removal Act (18 & 19 Vict. c. 121, s. 22), 15

property in, 15—40

- is *prima facie* in the Crown, 15, 65, 106, 429
- but subject to public rights of navigation, 15, 40, 65, 82, 429
- and of fishery, 15, 43, 65, 340, 345
- may belong to a subject by ancient grant or charter from the Crown, 15, 78
- or by prescription, 15, 20
- right of Crown appears to extend to whole area affected by tides, 15, 16
- construction and effects of grants of, by the Crown, 19, 81
- of lands adjoining, 21, 81
- alienation of Crown lands prohibited by 1 Ann. c. 7, s. 5...19, 81
- grantees of Crown take subject to public rights, 17, 40—43, 79, 80, 434
- and cannot make any claim or demand interfering with them, 17, 40—43, 79, 434
- interference with public rights on, is a nuisance, 18, 40, 68, 82, 346, 437, 529, n. (5), 623, 642
- with rights of the Crown on, is a purpresture, 18, 83, 438, 642
- title of a subject to, as against Crown by prescription, 20
- questions as to title between Crown and subject, procedure as to, 642
- may form parcel of a manor, 23—29
- what acts of ownership are evidence of title to, 20—29, 48, 49
- property in land formed by alluvion and dereliction, 29, 68—76
- duty of the Crown to protect from the sea, 31
- right of riparian owners to protect from the sea, 35, 39, 151
- from river floods, 82—87, 154, 438
- right of owner of tenement adjoining as regards access to sea similar to that of riparian owner on tidal river, 97
- See *Sea Wall*; *Overflow*.
- public right of navigation, 40
- includes the right to cross at low water, 40, 87, 93, 97
- right of bathing, *semble* does not, 46—48
- public right of fishery on, 40, 43, 98, 345
- several fishery on, 43, 98, 350
- See *Fishery*; *Several Fishery*.
- the right to take wreck on, 18, 27, 44
- See *Wreck*.
- to take sand, seaweed and shells on, 48, 49
- See *Sand*; *Seaweed*.

FOUNTAIN, statutory provision against fouling, 182, n. (2)

FREE FISHERY, A.

- definition of, 341
- when an incorporeal hereditament, can only pass by deed, 104, 337
- distinguished from a several fishery, 341, 342
- effect of grant of, 342, 370
- in tidal waters, 358
- in private waters, 370
- does not import the ownership of the soil, 370, 371
- See Fishery ; Several Fishery.*

FRESHWATER FISHERIES ACT, 1878, the (41 & 42 Vict. c. 39), 378, 389—391, 395, 397, 404

See Fishery.

FRONTAGERS, rights and liabilities of, as to sea defences, 34—40.

See Sea Wall ; Commissioners of Sewers ; Overflow.

FUR SEAL FISHERIES,

- convention between Great Britain and the United States respecting, 379, 380

GAS,

- statutory prohibition against pollutions by, 180
- washings, liability for pollution caused by, 180, n. (1)

GOIT, 127, 164, 254. *See Artificial Watercourse ; Mill.*

GRAND JUNCTION CANAL ACT, the (33 Geo. 3, c. 80), 474, n. (1)

HARBOURS,

- definition of, 50, 411
 - under 40 & 41 Vict. c. 16...411, n. (9)
- tolls in, 4, 53, 574, 577. *See Tolls.*
- rateability of, 595—598. *See Rates.*
- conservancy of, 51, 411, 412
- obstructions in, 40, 433, 434, 437, 438
- facilities of authorities for keeping in good order, 52
- See Ports ; Navigation.*

HERRINGS,

- enactments as to the protection of, 384

HIGH SEAS. *See Sea.*

HIGHWAY,

- on water,*
 - the sea is the, of all nations, 1, 2, 409
 - a public navigable river is a public, 81, 434
- on land,*
 - is a general term for all public ways common to the King's subjects, 529
 - no indictment lies for repairing a bridge unless it be situate in a, 525, n. (6), 529
 - at the extremity of bridges, repair of, 517, 536, 545
 - provisions of 5 & 6 Will. 4, c. 30, as to repair of, 518, 519, 526

HIGHWAY—continued.*on land—continued.*

definition of, under 5 & 6 Will. 4, c. 50, includes bridges not county bridges, 519

law as to toll for passage along a, on land applies equally to that along sea or navigable waters, 546

See *Navigation; Bridges; Toll.*

IMPROVEMENT OF LAND ACT, 1864,

powers of Inclosure Commissioners under, 463

meaning of term improvement of land, 463

INCIDENTS,

accompanying possession of rights relating to water.

See *Bridges; Ferry; Rates; Tolls.*

INCLOSURE COMMISSIONERS,

jurisdiction of Commissioners of Sewers transferred to, 463

powers of, under Improvement of Land Act, 1864, and the Land Drainage Act, 463

INDICTMENT,

interference with public rights is the subject of an, 18, 68, 82, 177, 346, 437, 529, n. (5), 542, 634, 642

pollution of streams, when amounting to public nuisance, punishable by, 177, 634, 635, 641

for obstruction of navigation, 68, 82, 440

of fishery, 346

for non-repair of bridges, 524, n. (1), 525, n. (1), 529, 532, n. (4), 538, 539, 542, 543, 544

See *Pollution; Nuisance; Fishery; Bridges; Remedies.*

INFORMATION,

at suit of the Attorney-General,

interference with public rights the subject of an, 18, 40, 82, 177, 437, 635, 642

for pollution of a stream, 177, 245, 246, 635

for obstruction of navigation, 2, 40, 82, 438

individual sustaining injury may join as plaintiff and relator, 635

See *Remedies; Pollution; Nuisance; Fishery; Navigation.*

English. See *English Information.*

INJUNCTION, remedy by,

Courts of Chancery and Common Law and County Court have now equal powers as to granting, 626—628

when granted in cases of nuisance and injury to property, 636

interlocutory, 636

perpetual, 637

mandatory, 637

not granted where damages are sufficient compensation, 637

principles on which Courts will grant, 504, 636—643

granted to prevent repeated actions, 637

and acquisition of rights, 123, 124, 637, 638

granted where an action lies by riparian owner for interference with stream, even where no actual damage is proved, 637

INJUNCTION—*continued*.

- damages not generally awarded in lieu of, for injuries to riparian rights, 165, 641
 - and balance of convenience and inconvenience cannot be considered, 165, 504, n. (2)
- no part of duty of Court to inquire how nuisance may be removed, 165, 639, 640
- Courts will not interfere in cases of merely prospective nuisance, 174, 639
 - however strong apprehension of injury may be, 174
- but probable continuance and increase of nuisance will be considered, 175, 639
- acquiescence in nuisance, how far a bar to obtaining, 173
- Court will not hold its hand on ground of a decision being appealed from, unless it doubts justice thereof, 639
- to restrain interference with right of access, 93, 436, 643
 - diversion and abstraction, 122, 124, 200, 208, 259, 640
 - interference with a ferry, 504—506
 - injuries to fishery, 346, 371, 643
 - to navigation, 359, 371, 437—446
 - pollution, 130, 159, 160, 164, 177, 201, 244, 372, 640—642
 - purprestures, 18, 83, 626, 642
 - statutory bodies from exceeding their powers, 171—173

INLAND WATERS, definition of, under the Explosives Act, 1875...494, n. (4)

INTERNATIONAL LAW,

- as to the sea washing the shores of states, 1, 11, 409
- as to fishery, 5, 12, 344, 379—381
- as to merchant shipping, 410, 413
- as to rivers forming the boundary between two states, 77, n. (1)
- as to inter-oceanic canals, 77, n. (1)

INTRUSIONS. See *Purprestures*.

IRELAND, Fishery Acts specially relating to, 379, n. (1)

IRRIGATION,

- right of a riparian owner to use water for, 121, 123, 125, 238, 239
 - in India, duty of zemindars to maintain tanks in their zemindaries for, 150, n. (1)
 - easement of, 238
- See *Riparian Owner ; Diversion*.

ISLANDS,

- in arms of the sea, when private property, 31
- arising in the sea, property in, 81
 - in private waters, property in, 102

JETSAM, definition of, 44, n. (12)

JUSTICES,

- jurisdiction of, on the sea shore, 15
 - as to offences on shores of tidal navigable rivers, 76

LAKES AND POOLS,

- definition of, 105
- ownership of soil of, 105—107
 - small ponds, 105
- large and navigable, question of ownership is doubtful, 105—107
 - the Crown has no *de jure* right to soil and fisheries of, 105, 349
 - American law as to such lakes, 107
 - where there are several adjoining proprietors, rule as to ownership *usque ad medium filum*, difficult of application, 106, 349
 - grant from Crown as owner of soil of lands adjacent, of islands therein, and of a free fishery, held not to pass soil of, 107
 - whether grant of a several fishery in, passes the soil, 107, 368
- right of navigation in, 107, 373, 460. See *Navigation*.
- right of fishery,
 - in *small non-navigable* lakes and pools, 108, 372
 - in *large navigable* lakes, 108, 348, 349, 372—376
- See *Fishery*.

LAMPERNS, law as to catching, 395

LAND CLAUSES ACTS, 1845, 1860, 1869,

- incorporation of into special Acts of water companies, 309, 311, 312
- a ferry is land for which compensation can be given under, 508, n. (3)
- a right of fishery is not, 339

"LANDED," meaning of term as regards goods shipped into harbour, 580, n. (2)

LANDING, the right of, as incident to the right of access, 40, 87, 97

LARCENY of fish in small ponds, 373, 404

See *Fishery*.

LARCENY ACT, the provisions of as to poaching fish, 404, 405

LEE CONSERVANCY ACTS, the, 467, n. (1)

- provisions of as to restriction of pollution, 181
- Conservancy Board constituted under may enforce the Rivers Pollution Prevention Act, 185, 186
- savings of rights under from provisions of Rivers Pollution Prevention Act, 187

LICENCE,

- to divert water, effect of a, 206, 210
 - a parol, may extinguish an easement, 209, 265
- to fish, revocable at will, 343, 368
 - in order to be binding on grantor, must be by deed, 104, 343

LIGAN, definition of, 44, n. (13)

LIGHTHOUSES,

- and buoys and beacons, regulations as to under Merchant Shipping Acts, 426
- tolls taken for, 576
- and lighthouse tolls, rateability of, 605
- See *Tolls ; Rates*.

LIGHTS,

- rules of the sea as to vessels using, 413, n. (1)
- in navigable rivers, rules as to, 427, 428
- in the Thames, *Appendix I.*, p. 649

LIQUOR TRAFFIC,

- convention between Great Britain, Belgium, Denmark, France, Germany and Holland respecting the, in the North Sea, 12, 379

LOBSTERS, enactments as to the protection of, 382, 384**LOCAL GOVERNMENT ACT, 1888 (51 & 52 Vict. c. 41),**

- powers of county councils under to enforce Rivers Pollution Prevention Act, 186, n. (1)
- powers as to bridges exercised by justices transferred to county councils by, 520

LOCAL GOVERNMENT ACT, 1894,

- powers of parish councils under, with respect to water supply, 326
- transfers to rural district councils powers of urban authorities as to bridges under Public Health Act, 1875...520

LOCAL GOVERNMENT BOARD,

- powers of under the Rivers Pollution Prevention Acts, 184, 185, 186, n. (1), 187
- the Canal Boats Acts, 499

LOCK DUES,

- rateability of, 612
- are a local earning, and locally rateable, 612
- See *Rates*.

LOCOMOTIVE ACT, the (24 & 25 Vict. c. 70), s. 7, does not apply to county bridges, 629

See *Bridges*.

LORD OF MANOR. See *Manor*.**MALICIOUS INJURIES TO PROPERTY ACT, the, 182, n. (2), 489**

- provisions as to restriction of pollution, 182, n. (2)
- protection of navigation, 489
- as to fishery, 182, 406

MANDAMUS,

- remedy by, 626
- See *Remedies*.

MANOR,

- the sea shore may form parcel of a, 23—29
- on the sea coast, 23
 - effect of grant of, 23
 - acts of ownership admissible to prove extent of grant of, 23—27
 - a port may be parcel of a, 51, 55, 567
 - right to take wreck is frequently attached to, 27, 44
- claim by lords of to fish in waters of, 104, 364
- "waste lands of," meaning of, 280
- right of lord of to fish in waters of waste, 364
- See *Sea Shore ; Fishery ; Ports*.

MARINE PROPERTY,

rateability of, 395—605

where not actually occupying soil, 603—605

MASTER, definition of under the Canal Boats Act, 1877...498, n. (6)

MERCHANT SHIPPING ACT, 1894,

jurisdiction of English courts over foreign vessels under, 3, 409

regulations as to the navigation of the sea under, 412—427

of inland waters, 427

Acts on the subject passed since passing of the, 428, n. (1)

See *Sea, the* ; *Navigation*.

MERGER,

natural rights of water are not extinguished by, 265

extinguishment of easements by, 216, 265

MERSEY CHANNELS ACT, 1897, the, 428, n. (1)

MERSEY AND IRWELL JOINT COMMITTEES ACT, 1892 (55 & 56

Vict. ch. cxc.), provisions of, 186, n. (1)

MILL DAMS AND WEIRS,

obstructing navigation, 359, 445

fishery, 360, 371, 399, 403

powers of Conservancy Boards and Commissioners of Sewers over, in navigable rivers, 462, 465

property in, in the Thames vested in the Conservators, 479, 480

See *Riparian Owner* ; *Easement* ; *Fishery*.

MILLS,

right of riparian owners to use water for, 121, 122, 126

for a mill newly erected, 113, 114, 116, 126

the use of the water for must be reasonable, 121, 122

and not interfere with the rights of other riparian owners, 113, 114, 121, 122, 126

right to divert the water of a natural stream to by artificial means, 127

easement to divert water to, 242

water-courses constructed solely for, are for a temporary purpose, 262

liability of owner of to repair a bridge used by the public, 525

See *Riparian Owner* ; *Easement*.

MINES,

below low-water mark, title of the Crown to, as against a subject, 10

the working of, evidence of ownership of the sea shore, 27

liability of owners of, for escape of water, 136—141, 143—147

the right to work, if duly exercised, begets no responsibility for injury by escape of water, 143

liability for throwing water on, which would not naturally have come there, 144

where an artificial is substituted for a natural channel, 145

no liability on owner of for draining away percolating or surface water, 189—191

or for intercepting water which would have percolated into a well, 191

or for abstracting water actually in a well, 196

liability for abstracting water actually in a surface channel, 197

MINES—continued.

- no right to support from water in, 199
- prohibition under the Rivers Pollution Acts as to drainage into streams from, 182, 183, 185, 187
- claim by custom to use a stream to carry away refuse from, 240
- claim to use an artificial watercourse by the owners of, 240, n. (2), 254, 256
- claim to use by tinbounders under custom of Cornwall, 240, n. (3), 254, 256
- claim to continuance of flow of water from, 256, 259, 260
- right to work under canals, 152, 153, 279, 286, 287
- reservations as to, in Canal Acts, 279, 281—287
- rights of water companies to interfere with under the Lands and Waterworks Clauses Acts, 312—314
- owners of, rateability of for a watercourse, 614
- See Overflow ; Riparian Owner ; Canal.*

MOORINGS in the Thames,

- rateability of, 604
- See Rates.*

MOUTH OF RIVER, definition of, 68, n. (8)!**MUSSEL FISHERIES,**

- law as to protection, &c., of, 381—384, 393
- See Fishery ; Oysters.*

NAR NAVIGATION ACT, the (24 Geo. 2, c. 19), 467, n. (1)**NATURAL rights of water. *See Riparian Owners.*****NAVIGABLE,**

- distinction between and "boatable," in American law, 430, n. (2)

NAVIGABLE RIVER. *See Tidal Navigable River.***NAVIGATION, and therein of the conservauy of navigation,**

- definition of, 408
- in the sea, 2, 12, 40, 408
 - the sea is the highway of all nations, 2, 409
 - jurisdiction over ships on the high seas, 2, 409
 - in the territorial waters of the realm, 5, 8, 9, 12, 409
 - over pirates, 4, 410
 - treaty or acquiescence may give sole right of, 1, 410
 - quare*, whether obstruction of is inconsistent with international law, 2
 - right of, in territorial waters, 12
 - right of includes right to anchor free of toll, 5, 40, 54, 55, 410, 565, 566
 - right is paramount to ownership of Crown and its grantees in soil of sea shore, 14, 40
 - includes the right to pass over shore at low water, 40, 97
 - no toll is demandable for navigating, except in ports and harbours, or where benefit is done to navigation, 4, 54, 55, 410, 547, 556, 559, 565, 573
 - in ports and harbours, 53, 411, 412
 - the regulations for under the Merchant Shipping Acts, 412—427
 - as to rules of the sea in sailing, steering, &c., 413—426, and notes

NAVIGATION—*continued.*in the sea—*continued.*the regulations for, &c.—*continued.*

foreign countries which have adopted the rules, 413

rules of the sea as to lights, fog signals, distress signals, sailing and steering, 413, n. (1)

as to collisions, 423, n. (1)

as to pilots and pilotage, 423—426

as to lighthouses, buoys, and beacons, 426

as to the duties of the Trinity House, 426

as to passengers, 427

as to lifeboats, 427

in inland waters, 40, 65—68, 81, 82, 87, 88, 99, 111, 359, 371, 427—460

on rivers forming boundary between two states, international law as to, 77, n. (1)

rules as to lights, signals, and collisions in, under Merchant Shipping Acts, 427, 428

exemption in favour of certain places where local rules are in operation, 428, n. (1)

in tidal waters, 429—453

the general right of is common to all the subjects of the realm, 65, 429 and extends to all waters navigable at any state of the tide, 67, 430

and to the whole of the navigable channel, 81, 82, 87, 359, 432, 439, 453

and includes the right of grounding and anchoring free of toll, 82, 433

unless some benefit to the navigation can be shown as a consideration for the toll, 433

and of stopping for a reasonable time to unload and for a wind, 82, 435

immemorial user of foreshore by owners of fishing boats by fixing moorings in soil may be supported as an ordinary incident of navigation, 433

or on presumption of a legal origin by grant from Crown, 433

and in the Thames on presumption of regulations prescribed by Port of London, 433

what is evidence that a river is navigable, 67, 430

change of course of a river does not destroy the right, 432

which can only be extinguished or abridged by Act of Parliament, by writ *ad quod damnum*, or by natural causes, 68, 82, 437

the right is paramount to the property of the Crown and its grantees, 82, 111, 434

and to the right of fishery, 99, 359, 371

the right of passage is simply a right of way, and involves no rights of property, 87

includes the right to pass over the shore at low water, 87

but not of landing, mooring or towing on the banks, in the absence of custom, 87, 435

right of access enjoyed by riparian owners superadded to the public right of, 93, 111, 435, 436

includes the right of passing over the shore at low water, 436

NAVIGATION—*continued.*in tidal waters—*continued.*

obstructions to navigation, 68, 82, 359, 371, 437—450

obstruction of the public right a public nuisance, and indictable, 68, 82, 437

and public right is not barred by an artificial obstruction, 68, 82

but erections on bed of a public navigable river are not necessarily a nuisance, 83, 87, 438

whether they are so is a question for the jury, 438

public benefit, how far a justification for obstruction, 440

private benefit too remote, 441, 445

weirs obstructing navigation illegal unless granted by Crown prior to Edw. I., 359, 371, 445

abatement of nuisances to, 446, 625

obstruction to navigation is actionable on proof of special damage, 82, 83, 437, 447

but obstruction of the right of access is actionable without such proof of special damage, 94, 447

whether obstruction of a river amounts to interference with right of access is a question of fact to be determined in each case, 95, 447

liability of persons erecting or keeping obstructions in a navigable river, 447

where authorized by a statute, 449, 450

duties and liabilities of persons navigating, 450—453

are bound to use reasonable skill and care, 450

the duty arises out of the control of the vessel, and ceases when the vessel ceases to be under control of owner, 450

where vessels are sunk by accident, 450

liability for injuries caused in carrying on traffic, 451

in non-tidal waters, 103, 453—460

right of *not* a public franchise paramount to all rights of property in bed, 453

but can only be acquired by grant, or prescription, or Act of Parliament, 103, 453, 454

semble, does *not* extend *prima facie* to passage over whole navigable channel as in tidal rivers, 453

but is limited to extent of right granted or user proved, 453

semble, claim to right must be treated as if it were a claim to establish a highway on dry land, 454

right of recreation by custom cannot exist in the public, but must be confined to inhabitants of a particular district, 454—458

query, how far a *cul de sac* may be considered a highway, 457, 458

obstructions to, illegal and a nuisance, 103, 458

semble, Crown may grant by charter to a subject who has made river navigable exclusive right of carrying goods thereon, 458—460

and owner is bound to maintain and work the locks, 458—460

it is doubtful whether large inland navigable lakes are navigable by the public at common law, 460

but such rights of navigation have been and may be acquired even where soil is private property, 460

NAVIGATION—*continued.*

the conservancy of navigation, 88, 460—500

origin of conservancy, 460

duty formerly vested in Crown as the representative of State, 461

delegated to various authorities, of which Commissioners of Sewers were chief, 461

meaning of "*sewer*," 461

duties and powers of Commissioners, 462—464

their jurisdiction as to nuisances, now vested in sanitary authorities, and as to land drainage in inclosure commissions, 463

in navigable rivers transferred to conservancy boards, 464

conservancy of Thames vested in Mayor and Corporation of London by 17 Ric. 2, c. 9...465

general powers of Commissioners of Sewers to remove obstructions in navigable rivers, 465

all rivers, ports and harbours now entrusted to conservators by Act of Parliament, 466

who are made guardians of navigation, performing in a fuller manner the powers of commissioners, 466

the statutes relating to inland navigation are of three kinds, 467

1. Such as restore or improve navigation of rivers formerly navigable, 467

2. Such as make navigable rivers not formerly so, 467

3. Such as provide for construction of an inland navigation or canal, 467

under first two classes of Acts care and conservancy is vested in commissioners, with certain powers, 467

but soil of bed is *not generally* vested in them, 89, 467, 606

and in such cases they are not in occupation of bed or towing paths, but merely an easement, 606

and are not rateable therefor, 606

distinction between rivers of which navigation is restored and those made navigable for first time, 467, n. (1)

conservators are not liable for damage to adjoining lands in absence of negligence, 468—470

nor bound at common law to keep navigation open or in proper repair, 470—473

though so long as they take toll for its use they are bound to take reasonable care that persons using it are not exposed to undue danger, 470—473

even where the tolls are taken solely for maintenance of the navigation, 470—473

no duty exists where no tolls are taken, 473

duty of, to maintain towing paths, 471—473

provisions of third class of statutes respecting preservation of navigation identical with those of the other two, but liability for injury by escape of water more extensive, 474

plans for construction of navigation to be approved by Admiralty or Board of Trade, 474

public only entitled to use navigation on payment of tolls, 474.

See *Canals*.

specimens of Conservancy Acts, 474, n. (1)

the Thames the best example of a complete system of Conservancy, 477

NAVIGATION—*continued.*the conservancy of navigation—*continued.*

The Thames Conservancy Act, 1894...477—484

places the whole river under a single authority and consolidates the law, 477

definition of Thames, 477

definition of shore, 477

property powers and duties of conservators, 477—483

bed under sect. 58 means foreshore, 478, n. (1)

and no person other than conservators or their agents can dredge or raise gravel there without licence, 478, n. (1)

but conservators are owners of the soil and foreshore for certain specified purposes only, 479, n. (1)

and not for purposes of the Public Health (London) Act, 1891, and so liable to abate nuisances not caused by their own fault, 479, n. (1)

soil and bed of river above Teddington lock belongs *prima facie* to riparian owners, 479, n. (1)

but conservators have acquired certain rights as to locks and towing paths therein by Act of Parliament, 479, n. (1)

dredging powers of conservators limited to improvement of bed of river as prescribed by statute, 480, n. (3)

and their licensee is not entitled to dredge for profit where soil of the bed and right of fishery are property of private owners, 480, n. (3)

limitations of rights of conservators as to tolls from piers, 482, n. (1)

powers of metropolitan water companies under Act, 483

repealed Acts relating to the Upper Thames, 483, 484

Thames Watermen's Acts, 484—488. See *Watermen*.*general enactments relating to the protection of inland navigation,*
488—500

boards of salmon conservators must not injuriously affect any navigable river, canal or inland navigation, 386

prohibition against casting ballast, &c., into navigable rivers, 488

prohibition against injuries to banks, walls, &c., under the Malicious Injuries to Property Act, 489

Railway Clauses Act, 1863, provisions of, 489—492

as to construction and management of bridges, 490

as to access to tidal lands and tidal waters, 491

as to railways skirting tidal and navigable rivers, 491

as to abandonment of works, 492

as to surveys of works over tidal lands or tidal waters by order of Board of Trade, 492

definitions under, 492

police regulations as to navigable rivers and canals, 492, 493

regulations as to tolls and rates, 493—496. See *Tolls*.

regulations as to traffic on navigable rivers and canals, 493—500

earlier enactments, 493, 494

Regulation of Railways Acts, 1873 and 1874...

495

Railway and Canal Traffic Act, 1888...495—

497

NAVIGATION—*continued.*the conservancy of navigation—*continued.**general enactments, &c.*—*continued.*regulations as to traffic on navigable rivers and canals—*continued.*

Act consolidates law and reconstitutes Railway and Canal Commission, 495, 496

requires uniform classification of merchandise and uniform tolls and rates, 496

provisions as to terminal charges and through rates and tolls, 496, 497

special provisions as to canals, 496, 497. See *Canals.*

the carriage of explosives, 498

boats used as dwellings, &c., under the Canal Boats Acts, 1877 and 1884...498, 499

provisions under the Education Acts with respect to children dwelling on board canal boats, 499

See *Sea ; Tidal River ; Private River ; Commissioners of Sewers ; Canal.*

NECESSITY, easements of, 216—229

NEGLIGENCE,

definition of, 137

vis major, no excuse in cases of, 36, 151

liability of canal owners for, 290, 303, 306

water company, 153, 314, n. (1), 319, n. (1)

with regard to navigation, 303, 447, 450, 470, 554

of owner of ferry, 513

conservators of rivers for, 470—473, 554

See *Statutory Powers, Bodies possessing.*

NETS,

kind and size of, permissible,

no restriction for sea fish other than salmon, 396

size of mesh for catching salmon, 393

stop net, what is a, 402

is a fixed engine within the Salmon Fishery Acts, 402, 403

draft or seine, regulations as to, under the Salmon Fisheries Acts, 399

using a, not peculiarly an instrument for taking salmon, not an offence within 24 & 25 Vict. c. 109...403

and tackle, are forfeited by persons poaching, 406

NORFOLK and Suffolk, fisheries of, regulated by 40 & 41 Vict. c. 98 (local), 379, n. (1), 389

Freshwater Fisheries Act extended to by 47 Vict. c. 11...389, 390, n. (3)

Broads, public no claim to fish in where not tidal, 349, 376

NUISANCE,

any interference with a public right is a, 18, 68, 82

and the subject of indictment or information, 177, 346, 437, 529, n. (1), 623, 642

or of an action, on proof of special damage, 18, 82, 177, 361, 437, 447, 635

so pollution of a stream amounting to, may be proceeded against by indictment, information or action, 177

NUISANCE—*continued.*

- a bridge built in a public way without public utility is a, 529, n. (1)
- persons empowered by statute to construct works must do so so as not to cause a public, 530
- a public, may be abated in a peaceable manner, 446, 625
 - but a private individual cannot abate, unless it does him special damage, 446, 625
- all infringements of rights of water are either trespass or, 622
- abatement of private, 623—625
 - previous demand to remove when necessary, 625
- remedy by action for, 626
 - as to bridges, 529, n. (1), 635, 636
- by injunction, 636—643
 - See *Remedies*.

OBSTRUCTION. See *Diversion*.

- an artificial, on a navigable river will not bar the public right of navigation, 68, 82
- to navigation, 68, 82, 87, n. (1), 359, 371, 437, 445, 447
- to fishery, 346, 360, 372, 399
 - See *Navigation*; *Fishery*; *Tidal Navigable River*; *Riparian Owner*.

OVERFLOW and escape of water, liability for injury caused by, 136—158, 314, n. (1), 319, n. (1)

- no liability where land is used in its ordinary manner, 137
- same principles apply to underground as to surface water in cases of, 138
- liability only extends to direct consequences, 137, 143
- liability for throwing on a mine water which would not naturally have come there, 144
- liability where an artificial is substituted for a natural water-course, 145—147
- from extraordinary rainfall, how far *vis major* is an excuse for at common law, 138, 139, 147—150
- how far *vis major* is an excuse where duty is imposed by contract or statute, 150
- where caused by negligence *vis major* is no excuse, 151, 152
- liability for where works are authorized by Act of Parliament for bringing or storing up water, 152—154, 268—272, 314, n. (1), 319, n. (1)
- negligence in cases of, defined, 137
- rights of riparian owners to protect their lands in cases of, of the sea, 31—40, 151
 - of inland waters, 82, 87, 154, 438
 - See *Floods*; *Riparian Owner*; *Vis Major*; *Sea Wall*.

OYSTER FISHERY,

- claim to, by prescription, 352, n. (2)
- "layings," grant of, held to pass the soil, 355
- claim to take toll for anchorage on, 55—57, 359
- damage to, by vessels navigating, 359
- provisions of 31 & 32 Vict. c. 45, as to powers of Board of Trade for establishment or improvement of mussel or, on sea shore, estuaries or tidal rivers, 381

OYSTER FISHERY—*continued.*

- provisions of convention between England and France annexed to 31 & 32 Vict. c. 45, as to season during which it is illegal to catch oysters, 392
- disturbance of oyster beds, 397
- fishery boards constituted under 51 & 52 Vict. c. 54, may regulate, 383, 392

PARISH,

- the sea and estuaries and arms of the sea are not *prima facie* within, 595
- nor the sea-shore, 15
- nor the shore or bed of tidal rivers, 76
- the sea-shore between high and low water mark, the bed of rivers and accretions from the sea incorporated by 31 & 32 Vict. c. 122, for all civil and parochial purposes with the adjoining, 15, 76, 597, n. (1)
- part of a pier below low water mark held not to be an accretion from the sea within 31 & 32 Vict. c. 122, but without the realm, 15, 596
- extending along shores of a tidal river, rateability of, 596
- may be indictable for non-repair of a bridge, by prescription, 544
- See *Sea ; Foreshore ; Bridges ; Tidal Navigable River ; Rates.*

PARISH COUNCILS, powers of, with respect to water supply under Local Government Act, 1894...326

PASSAGE, definition of, 515. See *Ferry ; Toll.*

PASSENGERS, provisions of the Merchant Shipping Act, 1894, respecting rights and obligations of, 427

PERCOLATING WATER,

- is not a watercourse or subject to the law of watercourses, 111, 143, 188
- water percolating towards a pond is not water in any stream leading thereto, 195, 196
- liability of mine owners as to, 143
- abstraction and diversion of, not actionable, 188
- right to drain for agricultural purposes, 188, 189, 262
- right of landowner to use of, not affected by statutory rights of water company to whom it subsequently passes, 195
- abstraction of subterranean water from wells, 189
- long user gives no further right of action as to, 191
- abstraction of water actually in a well, 196
- and of water in a defined *surface* channel, 196
- water actually in a defined *underground* channel, 197
- definition of "*defined channel*," 198
- and of "*known*," 198
- support from subterranean water, 199, 200
- pollution of percolating water, 161, 200
- See *Subterranean Water ; Pollution.*

PIER,

- part of a, built on iron piles extending below low-water mark on sea shore not rateable under s. 27 of 31 & 32 Vict. c. 122...15, 596
- tolls for, 575—580
- rateability of, 596—598
- floating, rateability of, 603, 604
- See *Tolls ; Rates.*

PILCHARD FISHERIES in Cornwall, regulations as to, 396, n. (6)

PILOTS,

- duties of, under Merchant Shipping Act, 1894...423—426
- definition of, under Act, 425
- definition of pilotage authorities, 424
- Board of Trade may constitute new pilotage authorities, 425
- Trinity House the chief authority with respect to, 426
- compulsory pilotage, provisions as to, 424, 425
- exemptions from compulsory pilotage partially abolished by Merchant Shipping Act, 1897...428, n. (1)

PIRATES, are the common enemies of mankind, and may be seized on the high seas and tried anywhere, 4, 410

POACHING OF FISH,

- stealing fish in ponds is larceny at common law, 373, 404
- penalty for unlawfully taking or destroying fish in waters adjoining or belonging to a dwelling house, 405
- or in other private waters at night or in day-time, 405
- definition of "unlawfully," 406
- where a *bond fide* claim is set up, 406
- arrest of persons fishing, 406
- seizure of nets and tackle, 406
- penalty for maliciously destroying dams and fish ponds, 406
- See *Fishery*.

POLICE REGULATIONS as to canals and navigable rivers, 492, 493

POLLUTION,

- of water in a natural stream,
 - is actionable at suit of a riparian owner, without proof of actual injury, 159, 160, 636, 640
 - though *actual* pollution of some kind must be proved, 175, 641
 - what amounts to *actual*, 175
- law as to, in Scotland, with respect to primary and secondary purposes of a stream, 159, n. (5)
- no defence to an action for, that fouling was also caused by others, 159, 160, 633
- or that trade causing, is carried on in a lawful manner, 160
- is in itself an unlawful act, and thus differs from diversion and obstruction, 160
- by water raised from mines, 144
- of surface and percolating water is actionable, 161, 200
- of subterranean water, 200
- of wells, 180, n. (1), 182, n. (1), 201
- of artificial watercourses, 161—164, 264
 - action for, will not lie at the suit of a mere licensee, 117, 118, 161, 162
 - where an action for damages by a riparian proprietor lies for, Courts will interfere to restrain by injunction, 164, 636, 640, 643
 - in case of damage to riparian rights by, Courts will not, except in special cases, award damages in lieu of injunction, 164, 641
 - practice of Courts as to granting injunctions to restrain, 165, 641
 - the Courts will restrain bodies possessing statutory powers by injunction, where powers are exceeded or abused, 171, 635
 - acquiescence in existing cases of, how far a defence to actions for, 173
 - the Courts will not interfere by injunction in cases of merely prospective injury from, 174, 639

POLLUTION—*continued.*

- the Courts will not interfere by injunction, &c.—*continued.*
 - and injury must be actual and existing, and not future, 174, 639, 641
 - however strongly apprehension of injury may be supported by scientific evidence, 174
 - value of scientific evidence in cases of, 174, n. (3)
 - if some degree of present nuisance exists, Courts will take into consideration its probable continuance and increase, 174, 639
- various sources of which have been held actionable, 176, 177
 - under the Rivers Pollution Prevention Acts, 183, n. (2), 184, nn. (1) (2)
 - under other Acts, 177—182
 - of wells, 178
- of a stream, when amounting to a public nuisance, may be prosecuted by indictment, or proceeded against by information at suit of the Attorney-General, 177, 635
 - and an action will lie therefor on proof of special damage, 177, 635
- by escape of gas washings, liability for, 180, n. (1)
- of a stream, so as to render it unfit for fish to live in, is actionable, 169, 177, 372
 - and ground for interference by injunction, 372, 643
- statutory restrictions upon, 177—188
 - in the Waterworks Clauses Act, 1847...177
 - Public Health Acts, 177—180
 - Gasworks Clauses Act, 180
 - Nuisances Removal Act, 1855...181
 - Thames Conservancy Act, 1894...181, 481
 - Lee Conservancy Act, 181
 - Salmon Fisheries Acts, 181, 182, 397
 - Malicious Injuries to Property Act, 182, 406
 - Other Acts, 182, n. (2)
 - Rivers Pollution Prevention Acts, 182—188
 - See *Pollution, Rivers, Prevention Act.*
- the easement of,
 - the right to pollute is an easement, and within the Prescription Act, 231, n. (7)
 - and may be acquired by Act of Parliament, grant, or prescription, 240, 243
 - can only be gained by continuance of perceptible injury for twenty years, 243
 - must not be considerably increased, 244
 - mere change in quality of, does not destroy, 247
 - of artificial watercourses, 248
 - See *Riparian Owner; Easement; Nuisance; Artificial Watercourse; Remedies.*

POLLUTION, RIVERS, PREVENTION ACTS, THE (39 & 40 Vict. c. 75 ;

- 56 & 57 Vict. c. 31), 182—188
- prohibition as to putting solid matters into streams, 182, 183
- prohibition of drainage of sewers or any solid or liquid sewage into streams, 183
- saving of persons using best means of rendering sewage harmless, 185
- proviso as to channels constructed, or in process of construction, at passing of Act, 183

POLLUTION, RIVERS, PREVENTION ACT—*continued.*

- duties of Local Government Board as to making orders, 184
- persons *not* to be guilty of offence as to sewage passing along drains sanctioned by sanitary authorities, 184
- proviso as to sanitary authorities under 56 & 57 Vict. c. 31...182, n. (3)
- prohibitions of drainage from manufactories and mines into streams, 183
 - restrictions on proceedings as to, 185
- duties and powers of sanitary authorities, 185
 - who must obtain consent of Local Government Board, 185
 - and of the Lee Conservancy Board, 186
- legal proceedings, how regulated, 186
- offences may be restrained by summary order of the county court, 186
- appeal to High Court by special case, 187
- certificate of inspector of Local Government Board as to means for rendering sewage harmless conclusive, 187
- orders as to costs, 187
- saving of existing rights, &c., 187
- as to rights of impounding and diverting water, 187
- as to rights under certain Conservancy Acts and of certain local authorities, 187
- definition of stream, 185
- county councils may enforce provisions of Act in streams passing through their county under Local Government Act, 1888...186, n. (1)
 - and Local Government Board may constitute joint committees of all administrative counties traversed by a stream, 186, n. (1)
- provisions of Mersey and Irwell Joint Committee Act, 1892...186, n. (1)
- and of Rivers Pollution Prevention (Border Councils) Act, 1898...186, n. (1)
- modification of law as to Scotland, 188, n. (1)
- application of law as to Ireland, 188, n. (2)

PONDS and Pools,

- definition of, 105
 - ownership of soil of, 105
 - ornamental artificial, liability for injury caused by bursting of dams forming, 147
 - fishery in, 372, 373
 - polluting, so as to kill fish in, 182, n. (2), 372
 - larceny of fish caught in, 373, 404
 - breaking down dams of, 406
 - jurisdiction of Commissioners of Sewers over, 462, 463
- See Lakes; Fishery; Overflow.*

POOLS. *See Ponds.*

PORPOISE is "royal fish," 46, 346. *See Royal Fish.*

PORTS,

- definition of, 50, 411, 581
- privilege of erecting, part of the prerogative of Crown, 50, 411, 560
 - but may be granted to a subject, 51
- ownership of soil of, 27, 51, 560
- limits of, 51, 578, 579, 581
- franchise of, evidence of ownership of sea shore, 27
- what is evidence of the existence of an ancient, 55, 565—569
- conservancy of, 51, 411
 - originally was in Crown, but now is transferred to the Board of Trade, 51, 411

PORTS—*continued.*

- removal of wrecks in, 53, 411
- duty to repair, 55, 559
- English, foreign vessels sailing to, liable to English law, 12
- foreign, foreign vessels sailing to and having right of passage within three miles of English coast, not subject to English law, 12
 - unless by express provision of Act of Parliament, 12
- tolls in, 4, 53—57, 559
- tolls for anchorage may be taken in, 5, 53, 55, 565
- rateability of, 595, 597—602
- See *Tolls; Rates; Sea.*

PRESCRIPTION,

- definition of, 230
- liability to repair sea walls by, 35—39
- claim to easements by, 178, n. (4), 230—241
 - by lost grant, 231
 - under the Prescription Act, 231—233
 - at common law, not superseded by Act, 233
- by and against whom claims may be made, 234—239
- necessary elements of enjoyment by, 234—239
- rights in artificial watercourses may be acquired by, 248
- rights to a ferry by, 501
- liability to repair bridges by, 543
- and immemoriality as to tolls, 551
- See *Easement; Ferry; Toll; Prescription Act.*

PRESCRIPTION ACT, THE (2 & 3 Will. 4, c. 71),

- claim to a watercourse under the, 231—233
 - by twenty years' enjoyment, 231, 232
 - forty years' enjoyment gives an absolute right, 232
- claim to pollute water of a natural stream is within, 231, n. (7), 243
 - and claim to go on a man's close and take water from a well, 231, n. (8)
 - and the right to keep an opening from a ditch into a stream closed, 231, n. (8)
- claim to have water diverted under, 231, n. (8), 232, n. (3), 258, 301
- claim to waste water allowed to pass from a canal to another canal is not within, 60, 61, 231, n. (8), 298
- claim to an easement under, by forty years' enjoyment can only be defeated by proof of licence by deed or writing, 232, 237
- a claim to a fishery in gross is not within, 339
- does not supersede the common law, 233
- now governs the question of immemoriality as to tolls, 551
- See *Easement; Prescription.*

PRIVATE RIVERS AND STREAMS,

- all streams above the flow and reflow of the tide are *prima facie*, 99
 - even though subject to the public right of navigation, 65, 66, 99
- the right of navigation gives no right of property or fishery in, 66, 99, 103, 453, 454
- ownership of soil of bed of, is *prima facie* in the owners of the adjoining lands, *ad medium filum aquæ*, 66, 67, 100, 362
 - and the share of each belongs to him in severalty, 100, 362
 - presumption that grant of riparian land passes soil *ad medium filum* holds good in copyhold as well as freehold grants, 101

PRIVATE RIVERS AND STREAMS—*continued.*ownership of soil of bed of, &c.—*continued.*

construction of conveyances of land described as bounded by a river, 100, 101

a river running along *waste* of a manor may be *waste*, 101award under Enclosure Act of *waste* bordering on a river, effect of, 101

where a stream changes its course, 70, 101, 102

where same owner is proprietor of soil on both sides of a, he is *prima facie* proprietor of the whole channel, 100, 363

the more than ordinary breadth of, does not affect the limits of grants on, 100

islands in, ownership of, 102

effects of shifting islands on right of fishery, 102

presumption of ownership may be rebutted, 102

soil of land covered by, and the right of fishery therein, may be specially conveyed to a third person, whether he have land on borders thereof or not, 102, 263

rights of owners over bed of, 83—87, 102, 137, n. (1)

to protect lands from floods, 83, 103

the right of navigation on,

may be acquired by the public by express grant, 103

or by immemorial user or Act of Parliament, 103

and where such right has been acquired, the obstruction of it is a public nuisance, and indictable as in tidal rivers, 103, 453, 458

differs from the same right in the sea and tidal waters, in that the right of passage is limited to the extent of the grant, or the user proved, 103, 453

the public acquire no right of proprietorship in the bed thereby, 65, 66, 99, 103, 453, 454

nor does it carry with it the right of fishery, 66, 74, 106

claim to a highway for boats over, must be treated as claim to establish a highway on land, 454

and right of recreation upon, by custom must be confined to inhabitants of a particular district, 454

the Crown has no right to property in such rivers when made navigable by Act of Parliament, 66, 103

or the public to the fishery, 66, 103

but the Crown has an interest of jurisdiction to reform and punish all nuisances in, 103, 458

weirs in, are not illegal, unless they obstruct navigation, 360, 371

the right of fishery in :

owners of land on, have exclusive right of fishery in, 101, 362

as a territorial right, 337, 363

See Fishery.

tolls on, 546, 547, 556

rateability of property occupying soil in, 604

rateability of rivers, 605, 606

See Riparian Owner ; Navigation ; Fishery ; Tidal Navigable River.

PROFIT À PRENDRE,

how distinguished from an easement, 204

a right of fishery in *alieno solo* is a, 337

a right to draw water from a well is an easement, and not a, 231, n. (8), 239

PROTECTION from inroads of the sea, 31—40, 151

See *Floods* ; *Sea Wall* ; *Commissioners of Sewers* ; *Overflow*.

PUBLIC HEALTH ACTS, THE,

provisions against pollution under, 177—180

what are public wells under, 178, n. (4)

powers of urban authorities as to bridges under Act of 1875 transferred to rural district councils by Local Government Act, 1894...520

PUBLIC HEALTH (SCOTLAND) ACT, 1867, powers of local authority as to public wells under, 178, n. (4)

PUBLIC HEALTH (IRELAND) ACT, 1878, what are public wells under, 178, n. (4)

PUMP, statutory restriction against fouling, 182, n. (2)

PURPRESTURE,

any unauthorized intrusion or encroachment on soil of sea shore or a navigable river is a, 18, 39, 83, 438, 642

and may be abated by the Crown or owner of the shore, 18, 438, 625, 642

or restrained by injunction at the suit of the Attorney-General, whether it be a nuisance or not, 18, 83, 642

whether a nuisance to navigation is a question of fact, 18, 83, 87, 438

the punishment of, is evidence of the ownership of the sea shore, 27, 29

RAILWAY AND CANAL TRAFFIC ACTS, 1873 AND 1888, THE

provisions as to traffic on canals and navigable rivers, 494, 497

RAILWAY COMPANIES,

when riparian proprietors, right of, to water engines, 121, 124

liabilities of, as to navigation under Railway Clauses Act, 1863 (26 & 27 Vict. c. 92), 489—492

liabilities of, for compensation to owners of ferries, &c. for loss of traffic, under Railway Clauses Consolidation Acts (8 Vict. c. 18 ; 8 Vict. c. 20), 503, 508—512

duties of, as to management and repair of bridges, under Railway Clauses Consolidation Act, 1845 (8 Vict. c. 20), 530, 537

RAINFALL, an exceptional, how far an excuse for injury caused by overflow, 146, 147

See *Vis Major* ; *Overflow* ; *Watercourse* ; *Artificial Watercourse*.

RAIN-WATER,

liability of landowner for bringing on to lands of another by artificially raising the surface of his own soil, 141

or discharging it from roof of a house by means of a spout or *drip*, 141, 142. See *Drip*.

exemptions from liability where damage results from neglect or default of third party, 142

RATES for the poor, payment of, incident to rights of water, 501, 546

arising from the improvement in value of land thereby, 546

rateability of piers, harbours, docks and marine property, 595—605

estuaries and arms of the sea are *prima facie* extra-parochial, 595

but presumption may be rebutted, 595

and there is no distinction between the sea shore and the shore of a tidal river as to extra-parochiality, 595

parish extending along the shores of a river, 596

RATES—*continued.*rateability of piers, &c.—*continued.*

occupiers of land covered with water, how rated under Local Government Act, 1858, s. 55...596

of piers, 596—598

part of a, below low-water mark beyond the realm and not extra-parochial within s. 27 of 31 & 32 Vict. c. 122...15, 596
nor an accretion from the sea, and therefore not rateable, 15, 76, 596, 597

built on piles in bed of a river in a parish extending along the shore thereof, how rateable, 596

land occupied by piers from which occupiers had no benefit, not rateable, 597

of docks, 598—603

wet docks, 598

profits of docks, if rated at all, were formerly rated where they were earned, 598, 599

but such properties are now rated parochially for earnings collected elsewhere, 599

apportionment of earnings where docks extend through several parishes, 599

occupiers of property capable of beneficial occupation liable to be rated at full rateable value without regard to benefit derived therefrom, 600

test of beneficial occupation, what is, 600

rule, how affected by statutory prohibition from earning rent, 600

persons to whose use certain accommodation in docks is appropriated not rateable as occupiers, 600, 601

exemption of the Crown from rates, 601

dockyards for government purposes are exempted, 601

but not tenants of Crown holding for their private benefit, 601

deductions allowable in the assessment of docks, 601, 602

dock property must be valued *in communibus annis*, 602

of marine property not actually occupying the soil, 603—605

rateability dependent on whether such property is in permanent beneficial occupation of the soil, 603

and whether the floating bodies have increased rateable value of the moorings, 603

floating piers and docks, 603, 604

barges, 604

permanent moorings in the Thames, 604

*of wharves, 605**of anchorage and beaconage tolls, 605**of lighthouses and lighthouse tolls, 605*

occupier is rateable in respect of annual value of lighthouse, machinery, &c., 605

unless lighthouse be in occupation of the Crown, 605

but is not rateable in respect of the tolls, 605

rateability of rivers and ferries, 605—607

of rivers, 605

where rivers are entrusted to trustees, conservators, &c., they are not rateable unless the incorporating Act vests soil in them, 605, 606

RATES—*continued.*rateability of rivers and ferries—*continued.**of rivers*—*continued.*

surveyor of a navigation held rateable as occupier of a house, though tolls exempted from rating by statute, 606

interest on a loan paid to commissioners of a navigation by a lessee is a rent on which a rate should be calculated, 606

conservators empowered to improve navigation of a river and make a towing path have merely an easement, and are not rateable in respect of the bed or towing path, 606

of ferries, 606, 607

tolls detached from local real property not rateable *per se*, 606, 607

lessee and occupier of an ancient and exclusive ferry, not being an inhabitant resident, not rateable for a share of the tolls, 606 nor the owner of a ferry, resident in a different parish, but taking profits thereof on the spot by his servants, for such tolls in the parish where they are collected, 607

rateability of a ferry between two townships occupying land in each, 607

distinction between ferries worked by hand or steam or wind freely over surface of water and those worked by chains or ropes lying on bed of river, 607, n. (4)

rateability of fisheries, 607, 608

not formerly rateable at common law, unless connected with use of land, 607

but now rateable under s. 6 of 37 & 38 Vict. c. 54...607, 608

rateability of canals and canal tolls, 608—613

canals, 608—610

were originally partially exempted, 608

and lands taken for canals were rateable as other lands in parish, 609

value of adjoining lands, how far to be considered, 609, 610

canal must be rated at value of adjacent lands at time of making rate, 609

but *quære*, whether value of uncovered land must be taken where adjoining land has been covered with buildings, 609 or the average value of whole adjacent lands should be the true criterion, 609, 610

“*property*,” what is, as distinguished from “*land*” for purposes of rateability of canals, 610

of canal tolls, 610—612

originally held rateable *per se*, 610, 611

but now are *not* so rateable, 611, 612

lock dues are a local earning and locally rateable, 612

trade profits are not rateable *per se*, but must be taken into consideration, 613

deductions allowable in assessing canals, 613

rateability of water companies, 613—619

where there is a profitable occupation of a public highway by private persons or companies, occupiers are rateable, 613

but profits are not, unless incident to the occupation, 613

water companies rateable for land occupied by their pipes, mains and reservoirs, 613, 614

RATES—continued.

rateability of water companies—*continued.*

water companies rateable for land, &c.—*continued.*

and by engine-houses, pumping stations and wharfs, 614

but not for their sewers, 614

how rateable value is to be calculated where works are in excess of existing requirements, and adapted to increased supply in future years, 614

for land, over which an artificial watercourse has been made, 614

for land, value of which is enhanced by a spring, 615

where reservoirs, works, &c., are outside a parish, 615

principle of apportionment where works extend through several parishes, 615, 616

under the Valuation of Property Act (Metropolis) (32 & 33 Vict. c. 67), ss. 43, 46 and 47...616

rateability of urban authorities and other public bodies supplying water, 616—619

are now assessed only for profits actually earned, 617

on the principle that occupiers are rateable on rent of a tenant from year to year, 618

land occupied by a local authority for public purposes is to be assessed at the rent which a tenant subject to similar restrictions would pay, 616

in assessing a local authority in respect of their reservoirs and pipes, &c., the amount collected by a water rate should be taken into account, 619

assessment where local authority has acquired waterworks by advances from general district rate, 619

rateability of bridges, 619—621

lessee of bridge tolls not rateable as such, 619

toll house, rateability of, 620

the principle that profits must be rated where earned applies to, 620

with regard to assessment the parochial principle holds good, 620, 621

bridges in different parishes, 620, 621

exemption of the Crown, 620

a bridge company whose revenue was raised from tolls held rateable although such revenue was absorbed by mortgage debts, 621

interest on a loan for construction which is paid out of profits not allowed as a deduction, 621

REALM OF ENGLAND, the extent of, 1, 5, 11, 13, 15, 596

See *Foreshore*; *County*; *Territorial Waters*; *Sea*.

REGULATIONS OF RAILWAY ACTS, 1873, 1874, provisions of, as to navigable rivers and canals, 495

REMEDIES, for infringement of rights of water,

all infringements of rights of water either trespass or nuisance, 622

public nuisance, what is a, 623

remedy by act of party, 623—626

private nuisance, 623—625

may be abated by party aggrieved, 623

if no more damage be done than actually necessary, 623, 624

the least mischievous way must be chosen, 624

previous demand to remove when necessary, 625

REMEDIES—*continued.*

remedy by act of party—*continued.*

public nuisance may be abated in peaceable manner, 446, 625
but private individual not justified in abating it unless it does
him special injury, 625, 626

remedy by act of law, 626—643

is now by action in one of the first four divisions of High Court of
Justice, 626

effect of Judicature Acts, 627

prerogative of intervention of Crown not affected by Judica-
ture Acts, 627

and of County Courts Act, 1888...627, 628

appeals, 628

private nuisance, 626—634

powers of Chancery and Common Law divisions similar as to
granting injunction or mandamus, 626, 627

extent and limits of jurisdiction of county courts, 627, 628

powers of, as to specific performance, 628

mandamus and injunction, 628

parties entitled to sue, 628, 629

joinder of plaintiffs, 630

parties liable to be sued, 631

parties liable for continuance of nuisance, 631

owner of land not responsible for acts of a stranger, 632

whether proof of actual damage is necessary as foundation of
action, 632—634

public nuisance, 634, 635

when actionable, 634

when indictable, 634

information at suit of the Attorney-General when available,
635

remedies as respects canal companies,

for injuries against, 296, 297, 629

for injuries by, 302, 303

indictment for non-repair of bridges, 635, 636

no action against county for injury from non-repair, 635

or against county surveyor, 635

an indictment will not lie unless bridge be in a highway, 529, 636

highway is a general term for all public ways, 529, 636

if a way be in decay an indictment lies, 636

no action on the case will lie without special damage, 636

and will not lie against the inhabitants of a county, because they are
not a corporation, 636

evidence admissible on indictment for non-repair, 636, n. (3)

powers of Court of Quarter Sessions as to, 636

remedy as to tolls, 555

a right of distress is incident to, 555, 594

and may be made on thing itself in respect of which toll is due, 555

or any portion of it, as on a ship or any part of it, 555

power of distress, implies antecedent right of action, 555

injunctions, rules as to, 636—643

when granted in cases of nuisance and injury to property, 636

interlocutory, when granted, 636

perpetual, when granted, 637

REMEDIES—*continued*.

injunctions, rules as to—*continued*.

mandatory, when granted, 637

See Injunction.

procedure,

in questions of title to the foreshore between Crown and a subject, 642

remedies for infringement of rights of fishery, 643

an action lies for breaking into a free or several fishery, 643

or obstructing the passage of fish, 643

pollution which kills or drives away fish restrainable by injunction, 643

and also erection of an embankment shutting out tide from a mussel bed, 643

injunction to restrain. *See Injunctions.*

See Action ; Indictment ; "Information" ; Injunction ; Trespass ; Nuisance.

REVENUE,

nations entitled by international law to take measures for the protection of, 10

and such provisions recognize the *three mile* limit, 10

RIPARIAN OWNERS, rights and duties of,

how regulated by *international* law where a river forms the boundary between two states, 77, n. (1)

on natural water-courses, 110—120

exist *jure naturæ*, 64, 92, 113, 115, 116, 250, 257, 258

founded *not* on ownership of the bed but on the right of *access* to the water, 92, 110, 118

law as to, in America, 110

exist only as to water flowing in defined channels, 59, 111, 188

above or below ground, 59, 111, 188

not as to percolating or surface water, 59, 111, 188

rights on navigable and non-navigable rivers identical save where controlled by the public right of navigation, 73, 92, 102, 103, 111

which the riparian owner on tidal navigable rivers enjoys superadded to his riparian rights, 73, 111

which are subordinated to it, 111

but he can acquire an interest in the water power by means of a reservoir, 111

and sell such interest as appurtenant to his land, 111

contact necessary to the existence of, 92, 112, 118

lateral contact is as good as vertical, 92, 112

contact in tidal waters, 92, 112

such rights *corporeal* hereditaments, 112

and not easements, but parcel of the inheritance and pass therewith, 112

are liable to be abridged, modified, or enlarged by acquired rights or easements, 112, 204

rights to enjoyment of a stream in its natural state in flow, quantity, and quality, 113, 121

and without obstruction, 113, 121

right to water is not *publici juris*, 113—116

RIPARIAN OWNERS—*continued*.

- obstruction of rights actionable without proof of special damage, 94, 116, 124, 125, 159, 160, 436, 437, 447, 632, 642
 - and may be restrained by injunction, 116, 124, 159, 160, 437, 636, 640, 642, 643
- right to compensation for, under Lands Clauses Acts, 96
 - under Waterworks Clauses Acts, 314, n. (1)
- right is not an *absolute* right to the flow of all the water, 116
 - but subject to the rights of other riparian proprietors, 116, 117, 121, 125, 175, 250, 257
- not limited by present enjoyment, 116, 126, 159
 - a new mode of enjoyment gives at once a right to sue for injury done thereto, 116, 159
- limited only by rights of proprietors in a similar position, 117, 118, 126, 159
- mere possession of water by one who is not a riparian owner will not enable possessor to maintain action for its diversion or pollution, 117, 118, 127, 128, 164, 254
- the grantee of a riparian proprietor must take water as he finds it, 118, 131—134
- and must not take water and return it in a state so as to do injury to those below him, 118, 119, 131—134
- sole right to water, 119
- special statutory property in water of stream, 120
- the right to water in its natural quantity*, 121—158
 - ordinary use for domestic purposes, 121
 - extraordinary use, 121—125
 - must be reasonable, and connected with tenement, 122, 123
 - unreasonable use a confiscation of rights of lower owner, 123
 - right of a railway company, if a riparian proprietor, to water engines, 121, 124
- local authorities may not alter flow of stream for water supply without consent of lower riparian proprietors, 125
- right of irrigation, 121, 122, 123, 125
- right to use water for mills, 126—134, 240—243
- right of diversion by natural means, 121—127
 - artificial means, 127—136, 162, 254
 - rights as against mere trespassers, 134—136
- liability to receive flood water, 121, 136, 154, 292, 293
 - negligence* defined, 137, 138
 - for escape and overflow of water, 136, 137
 - only extends to direct and proximate consequences, 137, 143
 - none for using land in the ordinary manner, 91, 137, 188, 189, 269, 270, 468, 469
 - for interfering with the course of a stream, 84, 137, 154, 196
 - where authorized by statute, 152—154, 269, 319, n. (1)
 - as to mining and underground water, 138, 281
 - water accumulated by natural user, 139
 - by non-natural user, 140
 - same principles of law apply both to surface and underground water, 138
 - the right to work mines, if duly exercised, begets no liability, 143, 152—154, 281

RIPARIAN OWNERS—*continued.*

the right to water in its natural quantity—continued.

liability to receive flood water—*continued.*

liability of mine owners for throwing on a mine water which would not naturally have come there, 144

for escape of water where an artificial is substituted for a natural watercourse, 145—147

for draining surface water, 188

and water from a well, 196

and water in surface channel, 196

how far *vis major* is an excuse for injury, 36, 147—152, 157, 293, 294, 319, n. (1), 450, 452

at common law, 147—150

where such duty is imposed by contract or Act of Parliament, 150—154, 451, 452

vis major no excuse in cases of negligence, 36, 151

liability as to storing water,

for bringing on land anything likely to do mischief, 140, 141

limited to allowing things *per se* injurious to pass to a neighbour's property, 141

or causing things *per se* harmless to do injury by passing to such neighbour's property, 141

liability for bringing sewage on to another's land, 141, 160, 161, 169, 172, 175, 176, 182—185, 201—203, 267, 623, 632

or discharging rain water thereon by *drip*, or means of spout, 143, 264, 629

the right to protect land from overflow,

on the sea, 31, 39

on inland waters, 83, 103, 154

owners may build bulwarks *ripariæ muniendæ causâ*, 103, 154—158

but not so as to injure in any way lands below them, 103, 154

mere apprehension not sufficient to found a complaint of acts done by opposite proprietor, 83, 84, 154

no right to build a mound which in times of ordinary flood would throw water of river on land of the opposite proprietor, 154, 155

in extraordinary floods, may exercise a reasonable selfishness in protecting themselves, 157, 293, 294, 319

the right to water in its natural quality, 158—188

incident to land through which water flows, 159

if infringed so as to occasion damage in law, though not in fact, gives a good cause of action, 159, 166—169

can restrain fouling of water without proof of actual injury, 159, 160 but must prove actual pollution, 175

law as to pollution in Scotland, 159, n. (5)

lower proprietor entitled to complain of such pollution as renders water unfit for primary purposes, 159, n. (5)

several sufferers may combine and bring joint action against several authors of nuisance, 159, n. (5)

no defence that water is also polluted by others, 159, 160, 167

case of pollution of a stream illustrates difference between injury and damage, 160, 167

pollution itself an unlawful act, and thus distinguished from diversion and obstruction, 160, 161

RIPARIAN OWNERS—continued.

the right to water in its natural quality—continued.

rights of licensees who are not riparian owners to sue for pollution,
162—164, 264

injunctions to restrain pollution, when granted, 165—177, 636, 640
See Injunction ; Pollution ; Remedies.

right of access to lands on navigable rivers, a right of property distinct
from public right of navigation, 93—98, 436, 643

injury thereto, actionable without proof of special damage, 94, 436,
447, 643

compensation for, under Lands Clauses Acts, 96
See Navigation ; Access.

right of fishery not strictly a riparian right, 99, 363
See Fishery.

right of navigation of, 111
See Navigation ; Access.

rights and duties of, on artificial watercourses,

are acquired and incorporeal rights, 112

depend entirely on words of the grant originating the right, 108, 109, 256, 257

either proved or presumed, 250, 251

See Artificial Watercourse ; Easement ; Canals.

RIVERS,

definition of, under Salmon Fisheries Acts, 385

and of "*tributary*," 385, n. (6). *See Tidal Navigable Rivers ; Private
Rivers ; Watercourse.*

conservancy of. *See Navigation.*

rateability of. *See Rates.*

RIVERS POLLUTION PREVENTION (BORDER COUNCILS) ACT, 1898,
61 & 62 Vict. c. 34, provisions of, 186, n. (1)

ROTHER RIVER NAVIGATION ACT, THE, 474, n. (8)

ROYAL FISH,

right to take, a prerogative of Crown, but may be communicated to a
subject by grant or charter, 18, 46

taking of, evidence of ownership of the sea shore, 27

whale, sturgeon, and porpoise, whether thrown on shore or caught in sea
within the realm are, 46

are property of Crown and not of the finder, 46, 346

but by grant or prescription may be property of a subject, 46

RULES OF THE SEA, 1896,

under the Merchant Shipping Act, 1894...413—423, and notes.

See Navigation.

definition of "*steam vessel*," 413, n. (1)

"*sailing vessel*," 413, n. (1)

under way, 413, n. (1)

**RURAL DISTRICT COUNCILS, powers of, as to bridges under Local Govern-
ment Act, 1894...520**

SAILING AND STEERING,

rules of the sea as to, 413, n. (1)

as to, in navigable rivers, 428, n. (1)

in the Thames, Appendix I., p. 649

SALMON,

- definition of, under 24 & 25 Vict. c. 109...393, n. (7)
- statutory restrictions as to poisoning water containing, 181, 182, 397
- provisions of Salmon Fisheries Acts, 1861—1886, as to, 377, 385—389, 390, 393—404
- formation of conservancy boards and districts, 385
- regulation of proceedings of boards, 386
- powers of boards, 386
- may do nothing to injuriously affect any navigable river, canal or inland navigation, 386
- powers as to making bye-laws, 386
- powers of water-bailiffs, 387
- regulations as to gratings, 388
- general superintendence of, vested in Board of Trade, 388
- appointment and duties of inspectors and commissioners, 388
- provisions as to the *season during which it is illegal to catch*, 393—395
 - restrictions as to sale of, 395, 396
 - and capture of, during close season, 396
- do not apply to fish caught beyond the limits of the Salmon Fisheries Acts, 393
- penalties as to contravention of provisions, 394, 396
- ignorance of distinction between samlets and trout a good defence, 394, n. (7)
- provisions prohibiting obstruction of passage during the close season, 394
- as to the measuring of unseasonable, 396, n. (5)
- provisions as to the *means by which it is illegal to catch*, 396—404
 - the use of dynamite, provisions as to, 397
 - use of lime, &c., 397
 - as to lights and spears, &c., 398
 - as to roe, 398
 - as to mesh of nets, 398
 - as to dams, weirs and fixed engines, 399—404
- claim to use privileged fixed engines, 401—403
 - weirs and dams, 403, 404
- licences required for catching, 398
- See *Fishery*.

SALMON FISHERIES ACTS, THE (1861—1886), provisions of, 181, 182, 352, 377, 385—391, 393—404. See *Salmon*.

SAND,

- digging or taking of, evidence of ownership of sea shore, 23, 27, 28
- right to take by prescription and custom, 48, 49
- See *Sea Shore*.

SANITARY AUTHORITIES,

- jurisdiction of Commissioners of Sewers as to drains and sewers transferred to various, 461—463
- matters, principal Acts relating to metropolis as to, 463, n. (1)
- to kingdom at large as to, 463, n. (1)

SCOTLAND,

- law of, as to *pollution*, 159, n.
- modification of law under the Rivers Pollution Prevention Act as to, 188, n. (1)
- Fishery Acts specially relating to, 378, n. (1), 397, n. (2)

SEA, THE, and rights therein, 1—57*high seas, the, 1—13*

definition of, 1

ownership of bed of, 1, 8

right of navigation on, 1, 2, 409—427

jurisdiction over ships navigating on, 2, 12, 409

fishery in, 2, 5, 12, 340, 344

territorial waters, 5—13

limits of, 5, 10, n. (5), 13, n. (6)

dominion of the Crown over, 5—8

recognition of territorial waters of foreign states, 5, n. (5)

title of Crown to soil of, 8

powers of protection and self-defence of Crown, 9

as against a subject, 10

provisions of 41 & 42 Vict. as to jurisdiction over, 8, 12, 409

provisions as to protection of revenue, 10

navigation on, 12

dominion of legislature over foreign ships, 3, 4

power to arrest foreign ship that has occasioned damage, 3

fishery in, 12, 42, 344, 380—384, 391—393, 396, 397

*creeks and arms of, 13, 595. See Creeks.**sea shore, 14—49. See Foreshore.*protection from. *See Sea-Walls; Overflow; Commissioners of Sewers.*land gained from, and lost by. *See Alluvion; Dereliction; Accretion.*tolls on, 556—586. *See Tolls.**See Ports; Harbours; Docks; Navigation; Fishery.***SEA FISHERIES ACTS, THE, 12, 379—384, 391, 392, 397**

conventions between England, the United States, Holland, Germany, Belgium, Denmark, and France annexed to, 12, 379—381

all restrictions on kinds and sizes of nets used for taking sea fish, except salmon, repealed by, 396

power of Board of Trade on application of county and borough councils to create sea fishery districts, 383

and to provide for constitution of local committees for regulating them, 383

local committees may make bye-laws as to close time in sea fishery districts in tidal waters, 392

provisions of, as to protection of oysters and mussels, 381—384, 392, 393, 397

crabs and lobsters, 382—384, 392, 393, 396, 397

herrings, 384, 396, 397

shrimps, prawns, and cockles, &c., 383

*See Oyster.***SEA-WALLS,**

prerogative of the Crown to erect, 32, 34

powers and duties of Commissioners of Sewers as regards, 32, 462

property in, 33

right of way along, 33

liability to repair not enforceable against the Crown, 34

nor at common law against a frontager, 34

the Crown may prevent destruction of natural barriers, 34, 35

liability to repair may be imposed on an individual by prescription, 35 even in an extraordinary tempest, 36, 38, 151

SEA-WALLS—continued.

- negligence in not repairing, 36, 151
- liability of tenant for life to repair, 38
 - and of mortgagee, 38
- presentments by juries as to repair, 38
- all occupiers benefited rateable to repairs in absence of prescriptive liability, 39
- when necessary, may be erected, though injurious to adjoining owners, 39
- liability at common law to keep a wall at a height prescribed by Commissioners of Sewers, 36, 151
 - and for damage caused through negligence in not doing so, 36, 151
 - See *Vis Major*; *Commissioners of Sewers*; *Overflow*.

SEAWEED,

- the right to take, evidence of ownership of sea shore, 23—27
- belongs *prima facie* to the Crown and its grantees, 48
- when thrown on land by extraordinary tides belongs to owner, 49

SEVERAL FISHERY, A,

- definition of, 338
- in the sea and tidal waters,*
 - prerogative of the Crown to create and grant to a subject, 18, 43, 98, 350, 353, 354
 - is a royal franchise independent of the ownership of the soil, 18, 43, 350, 353
 - which does not merge on forfeiture, 354
 - semble*, right to grant, is derived from ownership of the soil by the Crown, 69, 98, 350, 358
 - can now only be claimed by prescription or implied grant, 18, 43, 98, 350
 - what evidence will support a claim to, 350, 353, 401, 402
 - may be appurtenant to a manor, 340, 353
 - but not to land, 340, 353
 - grant of soil will not pass fishery, nor grant of, pass the soil, 27, 43, 99, 356
 - though coupled with grant of a manor, it may be evidence that soil was intended to pass, 43, 99, 356
 - owner of, can maintain trespass for breaking into his fishery and taking fish, 340, 643
 - and has a property in fish before they are caught, 340
 - is subject to the right of navigation, 43, 99, 359, 445
 - and grantee takes subject to that right, 99, 359
 - weirs appurtenant to, 359, 445. See *Weirs*.
 - poaching fish in, 405, n. (6)
- in private waters,*
 - belongs *prima facie* to the owners of the bed as a territorial right, 362
 - and as such is vested in the occupier of the land, 363
 - may be granted by owner to another apart from the ownership of the soil, 104, 106, 340, 368—370
 - claims of, by lord of a manor, 104, 364
 - in the waste lands of the manor, 364
 - may be appurtenant to a manor but not to a tenement, 340, 341
 - grant of, *prima facie* passes the soil, 107, 368—370

See *Fishery*.

SEVERN RIVER, The

- local Acts as to fisheries in, 379, n. (1)
- conservancy of, 465, n. (8)

SEWAGE,

- liability of landowners for bringing on to lands of a neighbour, 141, 160
161, 169, 172, 175, 176, 182—185, 201—203, 267, 623, 632
- for pollution by. See *Pollution ; Riparian Owner*.

SEWER,

- meaning and derivation of term, 461
- definition of, in modern statutes, 462, n. (1)
- drains, &c., formerly under jurisdiction of commissioners of sewers, 462
but now placed under various sanitary authorities, 463
- See *Commissioners of Sewers ; Pollution*.

SHANNON NAVIGATION ACT, The, 467, n. (1), 474, n. (3)**SHELL FISH,**

- right to take, between high and low water mark included in the public
right of fishing, 43, 98, 345
- protection of development of fisheries for, under 57 & 58 Vict. c. 26. See
Crab ; Lobster ; Sea Fisheries Acts, The.

SHIPS,

- foreign, jurisdiction of English courts over, 3, 8, 12, 409, 410
- causing injury to property, power under Merchant Shipping Act,
1894, to arrest, 3
- navigation in territorial waters by, 12
- on voyage to foreign ports with right of passage within three miles of
English coast *not prima facie* subject to English municipal
law, 12
- in absence of an Act of Parliament, 12
- but if seeking an English port *are* subject to English law, 12
- foreigners on board English, subject to English law, 3, n. (1)
- foreigners on board foreign, subject to English criminal law by 41 & 42
Vict. c. 73...12, 409
- regulations for English, under Merchant Shipping Act, 413—427
- duties and liabilities of persons navigating arise out of control of,
148, n. (1), 450
- and cease when control ceases, 450
- if sunk by accident no indictment lies against the owner, 450
- liability of owner where abandoned during extraordinary storm, 148, n.
(1), 450
- See *Navigation ; Collision ; Wreck*.

SHORE OF THE SEA. See *Foreshore*.

- of a river. See *Bank*.

SPRING, A,

- definition of, 58
- limits of, 59, 60
- may be formed into a well, 60
- effect of grant of, 210—215
- right to search for under local Act, 215
- claim to take water from on another man's land as an easement, 231, n. (3)
- rateability of land, value of which is enhanced by, 615
a mineral, 615, n. (1)
- See *Well ; Watercourse*.

STATUTES,

- for making rivers navigable, general nature of provisions, 474, n. (1)
- for constructing canals, 474, n. (1)
- for improving the navigation of rivers, 474, n. (1)

STATUTORY POWERS,

- bodies possessing, are substitutes for individual enterprise, 268
 - not responsible for injury caused by due exercise of their powers, 152, 268, 269, 449, 470
 - but responsible in case of negligence or exceeding their powers, 152, 268, 269, 449, 470, 554
 - whether they take tolls for their own benefit or that of the public, 91, 92, 272, 273, 554
 - and are bound to take reasonable care with regard to their works, 152, 269, 272, 273, 449, 554
 - but may exercise powers to fullest extent, provided they occasion no needless injury, 268, 269
 - if exercise of powers occasion inconvenience or injury, may be treated as bound to take measures to prevent its recurrence, 269, 319, n. (1)
- canal, water and dock companies are such, being incorporated to supply public wants for their own profit, 268
 - or invested with powers for the public benefit, 268
- courts will restrain by injunction the abuse or excess of powers by, 171
 - See *Canals*; *Water Companies*; *Docks*.

STEAM VESSEL, definition of under Rules of the Sea, 1897...413, n. (1)

STORM, liability of owner of a ship abandoned on account of, 148, n. (1), 151, 448, 451

STREAMS,

- definition of, 58, 59
 - under Waterworks Clauses Act, 310, n. (4)
- jurisdiction of commissioners of sewers over, 462
 - of Inclosure Commissioners under the Drainage Acts, 463
 - See *Watercourse*; *Tidal Rivers*; *Private Rivers*; *Easements*; *Subterranean Water*.

SUBTERRANEAN WATER,

- in defined channels, governed by same rules of law as streams above ground, 58, 111, 189—203
 - but if not flowing in known channel is not the subject of property, 195
 - or capable of being granted, 195
 - definition of "*known and defined channel*," 198
- diversion of, 189—200, 260—262
- pollution of, 161, 200—203, 259
- owner of land has no right at common law to support from, 199, 200
- percolating, law as to, 58, 111, 188—203
 - See *Percolating Water*; *Wells*.

SURFACE WATER. See *Percolating Water*.

TANKS,

- statutory provisions against fouling public or private, 182, n. (2)
- in India, law as to. See *Zemindar*.

TERRITORIAL FISHERY, A,

definition of, 337, 340

exists *primâ facie* in the owners of the bed of non-tidal waters, 362, 363

See *Fishery*.

THAMES, The,

ownership of soil of, up to high water mark, 88, 466, 467, 478, 479, n. (1)
of banks of, 471, 478

above the tide soil and bed belong *primâ facie* to riparian owners,
479, n. (1)

but conservators have acquired large rights as to locks, towing-paths, &c.,
479, n. (1)

meaning of "bed" in tidal portion of river, 478, n. (1)

"bed" includes the foreshore, 478, n. (1)

right of towing on banks of, 88, 435, 471—473

custom of mooring barges on, 435

duties of conservators as to towing-paths, 471—473

fishery in,

local Act as to, 379, n. (1)

bye-laws as to, Appendix II., pp. 664 *et seq.*

conservancy of,

entrusted to mayor and corporation of London by 17 Ric. 2, c. 9, 465

conveyed to the *conservators* appointed under 20 & 21 Vict. c. cxlvii.,
467, 479, n. (1)

this Act and all previous Acts relating to the river repealed by the
Thames Conservancy Act, 1894...477

repealed Acts relating to the Upper Thames, 483, 484

all the estate right, title, and interest in the bed, soil, and shores
vested in the conservators prior to the Act of 1894 are preserved
to them thereby, 478

definition of *the Thames*, 447

of *shore*, 447, 478, n. (1)

of *bed*, 478, n. (1)

bed includes foreshore, 478, n. (1)

qualifications and appointment of conservators, 477

their powers and duties, 477—483

as to towing paths, locks, weirs, and ferries, 480

as to fishery, 480, Appendix II., p. 664

as to removal of sunken vessels and obstructions, 480

as to dredging and altering the bed and channel, 480, 481

dredging powers are limited to improving the bed, 480, n. (3)

and their licensee may not sell proceeds of dredging for profit where
soil and right of fishery belong to a private owner, 480, n. (3)

may grant licences to owners and occupiers below Teddington Lock
for the erection of docks, piers, embankments, &c., 466—481, 482

as to the appointment of harbour masters, 482

as to regulation of pleasure boats, 482

as to pollution, 481, 483

Metropolitan water companies may require conservators to alter or
desist from works injuriously affecting river above their intakes, 483

as to beacons and lights, 482

as to tonnage duties and pier tolls, 482

approval of the Board of Trade required for erection of works below
Teddington Lock, 482

THAMES, The—continued.

conservancy of—continued.

- prohibition of use of fire-arms on river or banks between Barking Creek and Margaretness, 482
- power to make bye-laws regulating elections, 482
 - navigation, 482
 - bathing and prevention of nuisances, 482
 - imposition of penalties, 482
- saving of rights of the Crown, Trinity House, &c., 483
 - rights and privileges of owners or occupiers of lands on the banks of the Thames, 483
 - legal rights of ferry, 483
- financial arrangements under Act, 483
- rules governing watermen are framed by the Watermen and Lightermen's Company, 484
- Watermen's and Lightermen's Acts, 484—488

THAMES BYE-LAWS for regulation of navigation, Appendix II., 665

THAMES CONSERVANCY ACT, 1894, The, 477—483

TIDAL LANDS,

- definition of, under Railway Clauses Act, 1863...492
- duties of railway companies as to access to, 491

TIDAL NAVIGABLE RIVER,

- definition of, 65, 68, n. (8), 430
 - under Railways Clauses Act, 492
 - according to French law in Canada, 430, n. (2)
 - of navigable, 16, n. (4), 65, n. (1), 430, n. (2)
 - of tide, 65, n. (2)
 - evidence of navigability of, 67, 430
- bed of, presumably within the county, and subject to jurisdiction of justices and the common law, 76
 - jurisdiction of Central Criminal Court over, 76
 - not presumably within adjoining parish or manor, 76
 - though it may be, 76
 - and accretions thereto incorporated with adjoining parish for civil purposes by 31 & 32 Vict. c. 122...10, 15, 76, 597, n. (1)
 - construction of "*bank*" and of "*rivers*" under 31 & 32 Vict. c. 122...77
 - practice of Ordnance Survey Department in fixing parochial boundaries on, 77
- forming boundary between two counties, 77, 537
 - two parishes, 77, 596
- international rights on, when bounding two states, 77, n. (1)
- ownership of soil of bed, 65, 429
 - vested *prima facie* in the Crown for the benefit of the subject, 65, 429
 - may belong to a subject by grant from the Crown, 78
 - effect and limits of Crown grants on, 81, 434
 - subject to the public rights of navigation and fishery, 65, 80, 346, 429
- property and rights of Crown on, confined to tidal waters, 65
 - and limited by line of ordinary tides, 67, 68
- do not extend to the banks, which remain private, 87, 435

TIDAL NAVIGABLE RIVER—*continued.*

- change of course of, how affecting ownership of bed, 69, 73, 432
- rights of Crown and its grantees to build on bed of, 82, n. (1), 137, 154, 438—445
 - provided no injury is done to navigation, 82, 154, 438—445
- riparian rights on, similar to those above the flow of the tide, 92, 111
 - but controlled by the public right of navigation, 92, 111
 - but riparian owner can acquire interest in its water power as derived from a reservoir, 111
 - and sell such interest as appurtenant to his land, 111
- right of access to lands on, 93, 435, 436, 643
 - distinct from right of navigation, 93, 435, 643
 - interference with, actionable, without proof of special damage, 94, 437, 643
 - compensation for, under Lands Clauses Act, 96
 - right of landing as accessory to, 97, 436
 - See *Foreshore*.
- right of navigation on, 81, 111, 408, 429
- belongs by law to all the subjects of the realm, 82, 429, 432
 - at all times and states of the tide, 82, 432
 - and is a right to pass and anchor free of toll, 82, 431, 432
 - the Crown and its grantees cannot interfere with the right, 82, 83, 429, 431, 432, 434
 - does not extend to use of banks for mooring, landing or towing, 87, 435
 - in the absence of prescription, 87, 435
 - change of course of river does not affect the right of, 82, 432
 - if the river remain navigable, 82, 432
 - See *Navigation*.
- conservancy of,
 - formerly in the Crown, 32, 461
 - but now transferred to Conservancy Boards, 34, 88, 463, 464
 - See *Navigation—Conservancy of*.
- rights of fishery in,
 - prima facie* common to all subjects of the realm, 98, 340, 345
 - either as a common right, or derived from the Crown as owner of the bed, 98, 345
 - several fishery in, 98, 340, 350
 - free fishery in, 341, 358
 - See *Fishery* ; *Several Fishery* ; *Free Fishery*.
- tolls on. See *Tolls*.
- rateability of. See *Rates*.

TIDAL WATERS,

- definition of, under Railway Clauses Act, 1863...492
- duties of railway companies as to access to, under, 491
 - as to abandonment of works, 492
 - as to surveys, 492
 - See *Navigation* ; *Sea, The* ; *Tidal Navigable River*.

TIDE,

- limits of shore of the sea and tidal waters determined by line of medium, 14, 67
- extraordinary overflow by, 36, 38, 151
- as applied to tidal rivers, includes fresh water ponded back, 65, n. (2)
 - See *Sea, The* ; *Tidal Navigable River* ; *Vis Major*.

TITHES,

owner of, from land taken for purposes of the navigation, not entitled to compensation under a Canal Act, 289

TOLLS,

incident to rights of water, 501, 546
 right of Crown to authorize collection of, viewed with jealousy by courts, 502
 must be founded on adequate consideration, 4, 53, 433, 502, 551
 right to take, exists only by Act of Parliament, 4, 53, 551
 by express grant from Crown, 53, 551
 or immemorial usage, 53, 551
 payment of, enforceable by Act of Parliament within its operation, 4
 definition of, 546
 law as to highways on land applies to those on all navigable waters, 546
toll thorough defined, 547
toll traverse defined, 547
 distinction between *toll thorough* and *toll traverse*, 547—551
 the right to take, how supported, 551
 by *prescription and immemoriality*,
 prior to the Prescription Act, 551
 now is governed by that Act, 551
 definition of prescription, 551
 where rights are claimed by, jury are warranted to presume right
 immemorial, 552
 long enjoyment a foundation for good consideration, 55, 552, 566
 custom by which claimed must be reasonable, 57, 564
 tolls may be good under a custom of which a grant could not now be
 made, 552
the right to vary tolls,
 a toll reasonable but varying with value of money is valid, 553, 554,
 587, 591
 but equality clauses are expressly introduced in modern Acts, 308,
 493, 553
liability of bodies incorporated by statute and empowered to take tolls,
 where tolls are received for beneficial or fiduciary purposes, 272, 273,
 470, 554
 of conservators of rivers taking, 92, 468, 554
 extinguishment of, 554
 lease of, must be by deed, 555
 right of distress is incident to every toll, 555, 594
on the sea and navigable rivers,
 none demandable except where a benefit is done to community at
 large, 4, 53, 54, 410, 433, 556, 558, 559
 or where a toll is created by statute, 4, 53, 556
 powers of Thames Conservators as to, 482
on ferries,
 alteration of, no answer to action for disturbance of ferry, 514
 lie in grant and not in livery, 515
 an agreement to lease, must be under seal, 515
 inhabitants of particular place or individuals may have by custom
 right of passage over a ferry without paying, 515
in ports,
 formation of a port is sufficient consideration for, 4, 54, 559, 567
 ancient ports free of toll to subjects of the realm, 559

TOLLS—*continued.**in ports—continued.*

law as to erection of ports, 50, 560, 561

what consideration is sufficient to support claim, 53, 563

taking of, implies a duty to repair even where there is no beneficial interest, 55, 563

arise from ownership of property or franchise in, 53, 561

dues incident to ownership of, 4, 53, 559—569

anchorage, 5, 55—57, 562

no toll can be taken for anchorage except in, 5, 54, 563

but anchorage dues may be claimed in a port which is a natural roadstead, 55—57, 567—569

even though there is no obligation to repair, 55—57, 567—569

claim for anchorage dues cannot be made merely in respect of the use of the soil, 55, 556, 565

but immemorial payment is evidence of existence of a port and that tolls have a legal origin, 55, 567

ballastage, 562

dues incident to owner by usage, 562, 569

busselage and keelage, 562

primage, 562, 569

shore duties dependent sometimes on custom and sometimes on statute, 571

owners entitled to wharfage and crantage at common law, 571

amount of, may be fixed by prescription or grant, 331, 571

amount claimed must be reasonable, 57, 573, 574

but in private wharves rates are a bargain between the parties, 57
See *Wharf*.

in harbours, and for lighthouses, docks and piers,

are statutory tolls, 574, 575

exemption of Crown from, 575

statutes imposing, must be construed in favour of the subject, 575

lighthouse,

can only be taken when vessels benefit thereby, 576

ships belonging to the Crown exempt, 576, 577

pier and harbour,

"shipped for exportation," meaning of, 577—579

"owner and shipper," meaning of, 579, 580

"landed," meaning of, 580

dock dues,

depend entirely on Act of Parliament, 580

and when it is silent as to amount, dues must be reasonable, 580

"reasonableness" is a question for the Court and not for the jury, 581

meaning of term "port" as applied to, 581

assignment of, 581

duty of company to deliver, 581, 582

duties as to unloading of ships, 583

meaning of "duty outwards and inwards," 584, 585

"same voyage out and home," 584, 585

"*ad valorem* charge," 585

"keelmen's dues," liability to pay in the Tyne, 585

right to distrain for toll, 586

TOLLS—*continued.*

on canals,

right to, derived solely from the Act of Parliament, 307, 587
obligations as to equality and varying, 308, n. (3), 498—496, 553,
587, 591

no obligation on companies to impose equal tolls, 587

Acts imposing, must be construed strictly, 588

no general rules applicable to, 588

beneficial interest in, renders company liable for negligence in works,
470, 554, 594

rateability of, 605—607, 610—612, 619—621

See Navigation ; Rates.

TOWING,

no right of, at common law, on banks of navigable rivers, 87, 88, 435

right of, dependent on custom, 87, 88, 435

right of, on banks of Thames, 88

paths, ownership of, 89, 471—473, 479, n. (1), 480

may be dedicated to public if use not inconsistent with use for tow
ing, 88, n. (1)

duty of river conservators to repair, 90, 471—473, 480

See Navigation.

TRADE PROFITS, rateability of, 598, 601, 613. *See Rates.*

TRAFFIC, statutory regulations as to, on navigable rivers and canals, 493—
498. *See Navigation.*

TRENT RIVER NAVIGATION ACT, The, 467, n. (1), 474, n. (3)

TRESPASS,

all infringements of rights of water are either nuisance or, 622

right of owner of canal to maintain, 277

several fishery to maintain, 340, 643

free fishery to maintain, *provided* he is owner of the
soil, 341, 643

Commissioners of Sewers have no right to maintain, 33

See Remedies ; Nuisance.

TRIBUTARY, definition of under the Salmon Fishery Acts, 385, n. (6)

TROUT,

statutory enactments for the protection of, 377, 389, 394—396, 404, 405

close season for, 394

in the Thames, 395, n. (2)

measuring of unseasonable, 396, n. (5)

using dynamite to kill, 404

lights, spears, &c., 404

licences for taking, 404

no restriction as to size of nets, 404

See Fishery.

TYNE IMPROVEMENT ACT, 1850, The, 474, n. (3)

UNDER WAY, definition of, under Rules of the Sea, 1897...413, n. (1)

USAGE. *See Prescription.*

VALUATION OF PROPERTY (METROPOLIS) ACT, 1869, rateability of water companies under, 616

VIS MAJOR, or the act of God,

- definition of, 149, n. (2)
- how far an excuse for liability at common law, 36, 140, 147, 150, 293, 294, 319, n. (1), 451—453
- how far an excuse where liability is imposed by contract or Act of Parliament, 36, 150, 453, 540, 541
- is no excuse in cases of negligence, 36, 151, 269, 319, n. (1)

WATER,

- sole right to, 119
- special statutory property in, 64, n. (2), 120
- waste, from a canal, is not a watercourse, or subject to the law of water-courses, 60, 61, 231, n. (8), 298—301
- right to draw from a well, 205, 229, 231, n. (8), 239. *See Well.*
- in a defined course. *See Watercourse.*
- percolating and surface. *See Percolating Water.*
- subterranean. *See Subterranean Water.*
- natural rights of. *See Riparian Owner.*
- acquired rights of. *See Easements.*
- land covered with, how rateable under the Local Government Act, 597

WATER BAILIFF,

- under Salmon Fishery Acts, powers of, 387
- must produce his appointment before exercising his authority, 387, n. (6)

WATER COMPANIES,

- diversion by, for supplying a town, not a reasonable riparian use, 122
- See Riparian Owner.*
- duties of, as to cleansing and maintaining reservoirs, channels, &c., and other works, 268, 319, n. (1)
- rights of, 312—314
- rights of the public against, 315—319
- the London, rights and duties of under Metropolis Water Acts, 326—328
- under Thames Conservancy Act, 1894...
483
- See Water Supply; Rates.*

WATERCOURSE,

- definition of a, 58
- extent and limits of, 58—60, 197, 198
- must flow in a regular and well-defined channel, 60, 111
- definition of "*known and defined*," 198
- but it is not necessary that water should flow continually, 60
- an arm of the sea held to be a, for purposes of a Drainage Act, 58
- waste water allowed to pass from a canal is not a, 60, 61, 231, n. (8), 298—301
- consists of *bed*, *banks or shore*, and *water*, 61
- definition of "*bed*," 61, 478, n. (1)
- "*bank*," 61
- "*bed*" and "*water*" are correlative terms, 61

WATERCOURSE—*continued*.

- right to use of water in, does not arise from ownership of soil, 62, 110, 118
 - but from the right of access thereto, 63, 110, 118
- owner of soil of bed may grant lands through which it flows, reserving to himself the soil of such bed, 64
 - and grantee in such case will have the full use of the waters of, 64
- water in, is not *bonum vacans* according to Roman law, 64, 115
 - and none can have any property in it, 64, 115
 - save by statute, 64, n. (2), 120
 - but it is *publici juris* only so far that all who have a right of access thereto may have a reasonable use of it, 62, 64, 115, 116
- meaning of grant of, in law, 108, 109, 210, 211
 - must be shown by the context, 109, 211
- may be either a real or incorporeal hereditament, 205
- easement of, includes right of going on land to clear and repair, 229
- constructed solely for purposes of a mill is for a temporary purpose, 262
- natural rights on. See *Riparian Owner*; *Tidal River*; *Private River*.
- acquired rights on. See *Easement*.
- artificial. See *Artificial Watercourse*.
- subterranean. See *Subterranean Water*.
- jurisdiction of commissioners of sewers over pools, streams, and, 462
 - of the Inclosure Commissioners under the Land Drainage Acts, 463

WATERMEN AND LIGHTERMEN in the Thames,

- rules governing, framed by Company of Watermen and Lightermen incorporated by 7 & 8 Geo. IV. c. lxxv., 484
 - which is repealed except as regards the incorporation and property of the Company by the Watermen and Lightermen's Amendment Act, 1859...485
- provisions of Act of 1859 as amended by the Thames Conservancy Act, 1894...485
- definition of "lighterman" and "waterman," 485
 - "company," 485
 - "passenger boat," 486
- constitution and election of the company, 486
- rules as to plying on Sundays, 486
- all owners of barges and lighters to be registered, 486
- freemen of the company may employ apprentices on certain conditions, 486
- persons other than freemen or qualified apprentices navigating wherries, lighters, &c. within limits of Act, liable to a fine of forty shillings, 486
- watermen and lightermen's licences, 486
- no barge, lighter or boats for goods or merchandize to be navigated within limits of Act unless in charge of a licensed lighterman or qualified apprentice, under a penalty of 5*l.*, 487
- unlicensed persons rowing, steering or navigating for hire within limits of Act, liable to penalty of 5*l.* for each offence, 487
- no passenger boat to carry more passengers than licensed, under penalty of 40*s.* for each extra passenger, 487
- regulations as to fares charged for passenger boats, 487
- bye-laws may be made under Act if not inconsistent with bye-laws of the Thames Conservators, 487
 - and no bye-laws valid until approved by the Conservators, 487
- proceedings for penalties, savings, &c., 487, 488

WATER-RATE,

- liability for, 314, n. (1)
- definition of, 316, n. (3)

WATER SUPPLY,

- companies with Parliamentary powers, 309—320*
 - generally established by private Acts, 309
 - which incorporate the Waterworks Clauses Acts, 309—311
 - the Lands Clauses Consolidation Acts, 311, 312
 - and the Companies Clauses Consolidation Acts, 312
- rights and liabilities of companies, 312—323*
 - rights of the public, 315—320
 - duty to supply water for extinguishing fires, 314, n. (4), 319, n. (1)
 - rates and charges of companies, 314, n. (1), 316, n. (3), 318, n. (4)
 - "domestic purposes," what are, 316, n. (2)
 - water rate, definition of under 10 & 11 Vict. c. 17...316, n. (3)
 - "annual value" and "annual rack rent," definition of, 316, n. (3)
 - owner compounding for rates, decisions as to, 316, n. (3)
 - recovery of rates, decisions as to, 316, n. (3)
 - liabilities of companies for escape of water, 314, n. (1), 319, n. (1)
 - vis major*, how far an excuse, 319, n. (1)
 - duty as to compensation under the Lands Clauses Consolidation Acts, 319, n. (1)
 - decisions as to duties of companies, 319, n. (1)
- companies having no parliamentary powers,*
- rights and liabilities of, 320—322*
 - under the Gas and Water Facilities Act, 321, 322
- local authorities empowered to supply water, 322—326*
 - under earlier Acts, 322, 323
 - under the Public Health Acts, 1875 and 1878...323, 324, 325
 - meaning of "able and willing to supply," under s. 52 of the Act of 1875, 323, n. (5)
 - meaning of "reasonable cost," under Act of 1878...325, 326
 - under the Labouring Classes Lodging House Act, 1851...325
 - under the Municipal Corporations (Borough Funds) Act, 1872...325
 - protection of, under the Conspiracy and Protection of Property Act, 1875...325
 - under the Limited Owners' Reservoirs and Water Supply Further Facilities Act, 325
 - under the Local Government Act, 1894...326
 - London water companies, provisions of Metropolis Water Acts, 1852 and 1871, respecting, 326—328
 - definition of company under Acts, 327
 - Public Health (London) Act, 1891, provisions of respecting water supply, 328
- rateability of companies supplying, 613—615*
 - of urban authorities and other public bodies supplying, 616—619

WATERWORKS CLAUSES ACTS, 1847 AND 1863,

- provisions as to restriction of pollution, 177
- incorporation of in special Acts of water companies, 309—311
- See *Water Supply*.

WEIRS,

- where *obstructing navigation* are illegal and a nuisance unless granted prior to Edw. I., 359, 401, 445

WEIRS—continued.

- even if obstructing only part of the navigation, 445, 446
- the statutes prohibiting them relate to navigable rivers only, 371
- and a right to, in a non-navigable river may be established by prescription and is an easement within the Prescription Act, 231, n. (8), 371
- where *obstructing fishery* in public waters, *semble*, are illegal and a nuisance, 360
- and are actionable by owners prejudiced, 360, 372
- what kinds of, are actionable as obstructing passage of fish, 372
- enhancement of, such as the conversion of an ancient brushwood passable by fish into a stone weir not passable, is actionable, 372
- fishing, and dams, what are illegal within the Salmon Fishery Acts, 399—404
- fish passes in, 399, 400
- privileged, what are, 401, 402, 403
- what evidence will support a claim to, 401
- taking salmon within 50 yards above and 100 yards below, 399

WELLS,

- definition of, under Public Health (Scotland) Act, 1867, s. 89...178, n. (4)
- under the Public Health (Ireland) Act, 1878, 178 n. (4)
- abstraction of water percolating into, is not actionable, 189—196
- nor of water actually in, 196
- long user gives no further right of action, 191
- pollution of, 200
- statutory restrictions on polluting, 178, 179, n. (1), 180, n. (1), 182, n. (2)
- right to go on another's land to draw water from, 205, 229
- is an easement within the Prescription Act and not a profit *à prendre*, 204, 205, 229, 231, n. (8)
- effect of grants of, 212, 213—215
- right of water companies to sink, 312, 313
- See *Spring*; *Percolating Water*; *Subterranean Water*; *Easement*.

WHARF,

- right of access of owner to a, 98, 94, 436
- owner is entitled at common law to remuneration for use of, 571
- rates chargeable at a private, are a matter of bargain between the parties, 57
- amount may be fixed by prescription, 571
- custom as to wharfingers in London, 573
- amount claimed at, must be set forth with certainty, 573
- rateability of a, 605

WHARFAGE AND CRANAGE, 571

- are *shore* duties dependent sometimes on custom and sometimes on statute, 571—574
- definition of, 571
- See *Wharf*; *Tolls*.

WRECK,

- right to take, is a prerogative of the Crown, 18, 44
- in virtue of office of lord high admiral, 44
- but may be granted to a subject apart from the shore, 18, 44
- right to take, evidence of ownership of sea shore, 27, 44

WRECK—continued.

- is not appurtenant to ownership of shore, 44
 - but frequently exists as a franchise attached to a sea-coast manor, 44
 - right to take, implies right of crossing shore for the purpose of taking, 44
 - grant of shore alone does not pass the right, 44
 - nor is the shore passed by a grant of, 44
 - meaning of, within Statute of Westminster 1st, c. 4...44
 - under 3 & 4 Will. 4, c. 52...45
 - 17 & 18 Vict. c. 104...45
- owners may claim goods within a year and a day, 44
- if not claimed, goods to be delivered to officers of the Crown, 44
- where goods are perishable, they may be sold to prevent loss, 44
- where belonging to other than the king, he is to have them in the same way, 44
- flotsam, jetsam* and *ligan*, being on the land, pass by grant of wreck, 44
 - but only where ship perishes or owner of goods is not known, 44
- goods cast into the sea for fear of tempest not forfeited unless ship be lost, 44
- grantee of, has a special property in all goods stranded in his liberty, 45
 - and may maintain trespass for taking them away, 45
 - even though such goods are part of a cargo of a ship from which persons escaped alive, 45
 - and though owners identified them within the prescribed time and before seizure by the grantee, 45
- removal of, by harbour and conservancy authorities when obstructing navigation, under Merchant Shipping Act, 1894...53

ZEMINDAR, duty of a, to maintain tanks on his zemindary according to the laws of India, 150, n. (1)

THE END.

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